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THEIR SERVANTS' KEEPERS: EXAMINING EMPLOYER LIABILITY FOR THE CRIMES AND BAD ACTS OF EMPLOYEES

MONIQUE C. LILLARD*

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I. INTRODUCTION

A respiratory therapist is hired by a hospital. Within the next year he meets an underage male patient. After the boy is released, and after the respiratory therapist has been fired, the respiratory therapist molests the patient. Can the patient recover in tort against the former employer?¹

A parolee is given a job at a car wash. At the time of hire, the owner of the car wash is told that the parolee is on probation for a sexual offense and is not to interact with minors. At the car wash, the parolee meets a seventeen-year-old co-worker. A few weeks after the co-worker quits her job, the parolee rapes and murders her. Can her parents recover in tort against the employer?²

A high school teacher, employed by a public school district, has an affair with an eighteen-year-old high school student. She is psychologically injured. Can she recover in tort against the employer?³

These sad, sordid questions have come before the Idaho Supreme Court, presenting a myriad of issues regarding governmental immunity, standing, comparative negligence, and even constitutional law. There have been dissents and reversals. There has been legislation protecting employers. But can a rule be stated about when liability attaches to the employer? Is there consensus on which facts are the most decisive in these situations?

This article examines the tort duties that are owed by an employer to a victim of a crime or bad act committed by an employee acting outside the scope of his employment. Looking at common law, legislative action, and tort policy, I will argue that some room for employer liability does and should remain. I will do this in the context of the three Idaho Supreme Court cases arising from the facts summarized above, and I will examine recent legislation that is highly—and in some ways excessively—protective of employers.

All three cases involve plaintiffs seeking to impose liability on someone other than the main perpetrator of the wrong. To many, this is instantly counterintuitive and unjust; only the “bad guy” should be made to pay. A broader view of who is morally responsible comes only with a broader view of causation. “But for” a word of warning or “but

1. *Doe v. Garcia*, 131 Idaho 578, 961 P.2d 1181 (1998), *abrogated by* *Hunter v. State Dep't of Corr.*, 138 Idaho 44, 57 P.3d 755 (2002).

2. *Hunter*, 138 Idaho 44, 57 P.3d 755.

3. *Hei v. Holzer*, 139 Idaho 81, 73 P.3d 94 (2003).

for” a preventative step, the undesirable outcome would not have occurred. More broadly, “but for” the perpetrator being employed by the defendant employer, the dreadful result would not have occurred. The causal link pulls us to examine the duty, if any, owed by the employer. The finding of duty would broaden responsibility in order to avoid recurrence of these or similar injuries.

Two general propositions form the foundation of the American law of tort duty. First, if one undertakes to act, one must do so with due care—reasonably—so as to avoid foreseeable injury to others.⁴ Second, there exists, generally, no duty to undertake to act.⁵ One can, legally, just sit by passively and let foreseeably terrible things happen to other people.

These propositions come with exceptions. There is a duty to undertake to act in order to *protect* people with whom one has a special relationship.⁶ Some situations give rise to a duty to *control* a third party.⁷ In Idaho, defendants will not be found to have a duty to control the conduct of a third party unless there is a special relationship between the defendant and the third party or between the defendant and the plaintiff.⁸ The word “special” is a conclusion and is not helpful standing alone.

The challenge comes in deciding which of these rules applies to a given situation. When is one acting? Is the act of employing someone an “act,” such that an employer must employ and supervise with due care? The Idaho Supreme Court has answered this question to some extent already: “Every person, in the conduct of his business, has a duty to exercise ordinary care to ‘prevent unreasonable, foreseeable risks of harm to others.’”⁹ Employment of personnel is a significant portion of conducting business. At one level, this answers the ques-

4. *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980). This is a general statement of duty. Specifics relating to the case must be addressed, including whether harm to the plaintiff was foreseeable and whether a finding of duty is well placed in the particular circumstance. The factors articulated in *Rife v. Long* are helpful here. 127 Idaho 841, 846–47, 908 P.2d 143, 148–49 (1995).

5. *Sterling v. Bloom*, 111 Idaho 211, 225, 723 P.2d 755, 769 (1986), *superseded by statute*, IDAHO CODE ANN. § 6-904A (2004), *as recognized in* *Harris v. State Dep’t of Health & Welfare*, 123 Idaho 295, 847 P.2d 1156 (1992).

6. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999) (citing RESTATEMENT (SECOND) OF TORTS § 314A (1965)); *see also* RESTATEMENT SECOND § 314B.

7. *See infra* Part III.B.

8. *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673 (1999) (citing RESTATEMENT SECOND § 315).

9. *Id.* at 247, 985 P.2d at 672 (citing *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990)).

tion. A tort duty already exists in Idaho to hire, train, and supervise with care, so as to reduce the possibility of harm to others.

Further support for the finding of a duty can be found by examining the employer's extant duty to *control* employees, and the employer's obligation, as a business or service provider, to *protect* patrons. By virtue of standard rules of respondeat superior and agency, employers are vicariously liable for their employees within common law and legislative limits. Liability for negligent hire, training, or supervision is not new. Our three cases present the wrinkle that the employee perpetrators were not acting in the course of their employment nor were they doing what their employers wanted them to do; rather they were off on pernicious frolics and detours.¹⁰ The imposition of liability is still within precedent and public policy, especially if the scope of the duty is limited to situations where the employer has knowledge of special hazards. Recent legislation still further limits the employer's scope of duty.

More support for the finding of duty in these cases comes from the established obligation of the employer—a business or service provider—to *protect* certain people. Here the emphasis is on the relationship between the employer and the victim. Schools have a duty to protect their students, hospitals have a duty to protect their patients, and employers have a duty to protect their employees from harms and hazards. The employment relationship with the perpetrator is unimportant to this analysis. Again, certain limits may be imposed on this duty.

In our three cases, defendants arguably had both a duty to control the employee and a duty to protect the plaintiff. In other words, defendants were in two relationships: one with the employee perpetrator, and one with the victim plaintiff; each relationship sufficiently "special" to give rise to a tort duty.

Factually, our three cases may be at the outer limits of any duty owed by an employer to a victim. In two, the key relationships were over. In none of the cases did the crimes, torts, or bad acts take place on the employer's premises or during the hours of employment. These facts may have been sufficient to insulate the employer defendant from liability under title 6, section 1607 of the Idaho Code.¹¹ Yet neither case law nor legislation should be read to support a blanket proposition that employers owe no duty to the victims of their employees' torts or crimes. Language in a 2002 Idaho Supreme Court case

10. See *infra* Part II.

11. IDAHO CODE ANN. § 6-1607 (2004).

could be read to deny any duty.¹² That unfortunate interpretation should be clarified.

Throughout this article I will use the example of a plumber that is hired to make house calls, because most if not all readers have experience with these skilled and necessary tradesmen. The plumber is called often in an emergency by a homeowner distressed by spewing water or overflowing sewage. The plumber often encounters a female alone in a home, who will ask him to walk with her far into the private recesses of the house to repair the problem. The plumber is often left unsupervised, alone with financial papers, jewels, and the like. The plumbing company is aware of all this. If an errant and aberrational plumber assaults the homeowner, or steals items of value, should not the homeowner be allowed to sue the plumbing company if it failed to do a reasonable hiring check on the plumber by looking at least for past crimes of violence and theft? Or if the plumbing company ignored signs of the plumber's unscrupulous proclivities or intentions? The vulnerability of the person in the house, the unanticipated and frantic nature of the invitation into the home—these are factors arguing for a determination of special hazard or risk, and the existence of a tort duty. Add to that the fact that the only reason this particular and otherwise unknown individual was admitted into the home is that he was sent out by the company and is recognizable by garb or identification bearing the imprimatur of the plumbing company.¹³

The Idaho legislature, in 2002, passed title 6, section 1607, which reads in relevant part:

Employer liability for employee torts

(1) No employer shall be directly or indirectly liable in tort based upon an employer/employee relationship for any act or omission of an employee which occurs after the termination of the employee's employment unless it is shown by clear and convincing evidence that the acts or omissions of the employer

12. *Hunter v. State Dep't of Corr.*, 138 Idaho 44, 57 P.3d 755 (2002).

13. In more formal societies, "letters of introduction" were standard means for one person to vouch for another's gentility. For a representative painting, see SIR DAVID WILKIE, *THE LETTER OF INTRODUCTION* (1818), available at <http://www.abcgallery.com/W/wilkie/wilkie4.html>. For another visual image, remember the letters of transit at issue in the movie *CASABLANCA* (Warner Brothers, 1942). In our society the fact of employment serves as a letter of introduction.

itself constitute gross negligence¹⁴ or reckless, willful and wanton conduct as those standards are defined in section 6-904C, Idaho Code, and were a proximate cause of the damage sustained.

(2) There shall be a presumption that an employer is not liable in tort based upon an employer/employee relationship for any act or omission of a current employee unless the employee was wholly or partially engaged in the employer's business, reasonably appeared to be engaged in the employer's business, was on the employer's premises when the allegedly tortious act or omission of the employee occurred, or was otherwise under the direction or control of the employer when the act or omission occurred. This presumption may be rebutted only by clear and convincing evidence that the employer's acts or omissions constituted gross negligence or, reckless, willful and wanton conduct as those standards are defined in section 6-904C, Idaho Code, and were a proximate cause of the damage sustained.

(3) In every civil action to which this section applies, an employer shall have the right (pursuant to pretrial motion and after opportunity for discovery) to a hearing before the court in which the person asserting a claim against an employer must establish a reasonable likelihood of proving facts at trial sufficient to support a finding that liability for damages should be apportioned to the employer under the standards set forth in this section. If the court finds that this standard is not met, the claim against the employer shall be dismissed and the employer shall not be included on a special verdict form.¹⁵

This legislation was not mentioned in the three main cases described in this article, although it was enacted before two of them were decided. While it provides significant protection to employers, it does not preclude all liability.

14. IDAHO DRAFT JURY INSTRUCTION 2.24 (2003) defines gross negligence as "distinguished as a matter of degree from ordinary negligence. Gross negligence involves carelessness that is so great that there was not just an absence of the ordinary care that should have been exercised, but a degree of negligence substantially greater than that which would constitute ordinary negligence."

15. § 6-1607(1)-(3). The legislation expressly did not limit any person's rights under the state human rights laws. § 6-1607(4).

This article will discuss employer liability for criminal, tortuous, or otherwise bad behavior by an employee or a former employee. First, I will discuss the facts and results of the three cases introduced at the beginning of this article. Then I will discuss case precedent and recent legislation, and finally the current state of the law in the context of the three cases.

II. THE CASES

A. *Doe v. Garcia*

John Doe, a thirteen-year-old, was a patient for six weeks at St. Alphonsus Regional Medical Center (the hospital) after a serious bike accident.¹⁶ There he received respiratory therapy from Fred Garcia, a hospital employee. Doe and Garcia became friends. As Doe left the hospital, Garcia gave him "his telephone number and told him to call sometime, suggesting that they could hang out together."¹⁷ The friendship continued, apparently with no sexual content.¹⁸ There was "no evidence that the hospital was aware of" these contacts.¹⁹

Ten months later, Garcia was discharged from the hospital for soliciting an underage employee to go drinking, despite an earlier verbal warning for the same offense.²⁰ He began driving a taxi and kept up his friendship with Doe. Doe and his family were aware that Garcia no longer worked at the hospital, but they did not know why.²¹ Later that summer, within a month or so of his firing, and about eleven months after Doe was discharged from the hospital, Garcia began sexually molesting Doe.²² Doe was, by then, thirteen or fourteen-years-old. The molestation continued for three years.²³ No sexual activity occurred on hospital premises.²⁴ Garcia was sentenced to prison for the crime.²⁵

16. *Doe v. Garcia*, 131 Idaho 578, 583, 961 P.2d 1181, 1186 (1998) (Schroeder, J., dissenting), *abrogated by* *Hunter v. State Dep't of Corr.*, 138 Idaho 44, 57 P.3d 755 (2002). John Doe's real name was not revealed because he was a minor victim of a sex crime. The records and briefs of the case are sealed. This fact pattern presents so many duty questions that it was used for a torts exam at the University of Idaho in Fall 2003.

17. *Id.*

18. *Id.*

19. *Id.* at 583, 587, 961 P.2d at 1186, 1190.

20. *Id.* at 583, 961 P.2d at 1186.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 587, 961 P.2d at 1190; *but see infra* note 216.

25. *Id.* at 583, 961 P.2d at 1186.

Doe and his parents sued Garcia, Garcia's wife, and the hospital. One cause of action was negligent hire. When the hospital hired Garcia, it reviewed his application, contacted one of his past employers, and conducted a half-hour personal interview.²⁶ Garcia's past conviction for a DUI was revealed on his application.²⁷ Doe argued that the hospital should have inquired about that and the circumstances of Garcia's termination at the last place he was employed as a respiratory therapist, St. Mary's Regional Medical Center in Reno, Nevada.²⁸ Doe also argued that the hospital should have filed a written request for access to his personnel file.²⁹ This would have revealed that he was dismissed for sexual molestation of a patient.³⁰

Another cause of action was for negligent supervision. There were two moments when the hospital arguably could have taken stricter action which may have prevented Doe's ordeal.³¹ Both were in the fall of 1987; Doe was not admitted as a patient until August of 1988. The first instance arose shortly after Garcia's hire. Garcia sought counseling from an Employee Assistance Program (EAP) counselor, who was directly employed by the hospital.³² He told her that he was "quite preoccupied with sex,"³³ felt "sexual[ly] addict[ed],"³⁴ and stated "any partner will do."³⁵ He also admitted to her that he had been terminated from St. Mary's for sexually molesting a patient two

26. *Id.* at 579, 961 P.2d at 1182 (majority opinion).

27. *Id.* at 584, 961 P.2d at 1187 (Schroeder, J., dissenting). "DUI" is the crime of Driving Under the Influence of alcohol. See IDAHO CODE ANN. § 18-8004 (2004).

28. *Garcia*, 131 Idaho at 580, 961 P.2d at 1183 (majority opinion).

29. *Id.* Absent a written request, St. Mary's would "release only dates of employment and positions held." *Id.*

30. *Id.* Also in Garcia's record was a California criminal conviction for sexual improprieties. This does not figure into the majority's decision. The district court wrote that "[t]he only evidence in the record is that this criminal conviction does not show up on Idaho law enforcement records, and would not have been revealed to the hospital even if an inquiry had been made." *Id.* at 584, 961 P.2d 1187 (Schroeder, J., dissenting).

Throughout this article, I will refer to the points made as those of the dissent, although Justice Schroeder's opinion consists entirely of the findings and conclusions of the district court. *Id.* at 582, 961 P.2d at 1185 ("I adopt the reasoning and result reached by the district court and set forth the pertinent portions of the opinion of the district court as my dissent.").

31. Plaintiffs also claimed that Garcia should have received training in ethical conduct with patients. The district court characterized this as speculative and imprecise. *Id.* at 586, 961 P.2d at 1189.

32. *Id.* at 579, 961 P.2d at 1182 (majority opinion).

33. *Id.*

34. *Id.* at 583, 961 P.2d at 1186 (Schroeder, J., dissenting).

35. *Id.* at 580, 961 P.2d at 1183 (majority opinion). The Idaho Court of Appeals, characterizing these same facts, wrote that Garcia had disclosed to the EAP counselor that "he was sexually attracted to young males" and that "while employed at another hospital he had fondled a male patient." *Doe v. Sisters of the Holy Cross*, 126 Idaho 1036, 1038, 895 P.2d 1229, 1231 (Ct. App. 1995).

years earlier. The EAP counselor consulted with her supervisor but did not tell any other hospital employees about Garcia's history.³⁶ The hospital admitted in its summary judgment papers that "the EAP counselor would reveal information gained from an employee if 'someone was in danger.'"³⁷ It is hard to tell from the court's recitation of the facts, but the hospital apparently required the EAP counselor to reveal information of generalized harm to the hospital community, not just if a specific person was threatened.³⁸ The hospital would be liable for the *Tarasoff* claim because it was vicariously liable for the counselor, who was acting within the scope of her employment.³⁹

The second moment when the hospital could have acted arose around the same time, but was not the basis for the Idaho Supreme Court's remand. Garcia encouraged several adult but underage em-

36. *Garcia*, 131 Idaho at 583, 586, 961 P.2d at 1186, 1189 (Schroeder, J., dissenting).

37. *Id.* at 580, 961 P.2d at 1183 (majority opinion). *But see infra* note 39. Although the court does not say so, that hospital rule probably had its genesis in the California case of *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976). For further discussion of the *Tarasoff* case, see, *inter alia*, D. L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of Tarasoff*, 24 PAC. L.J. 1165 (1993); Part III.D below. The hospital's policy may have been broader than the duty articulated by the *Tarasoff* court. The dissent in *Garcia* made note of title 6, section 1902 of the Idaho Code, requiring "a mental health professional to give a warning only where the professional has knowledge of an 'explicit threat of imminent serious physical harm . . . to a clearly identified or identifiable victim.'" *Garcia*, 131 Idaho at 586, 961 P.2d at 1189 (Schroeder, J., dissenting) (quoting IDAHO CODE ANN. § 6-1902 (2004)).

38. On the other hand, the district court found that there was "no proof that [the counselors] were expected to report to the hospital any details of the counseling conducted under the EAP programs; in fact, all of the proof was exactly the opposite: that they were expected to hold everything learned through the EAP program in strict confidence to maintain the credibility of the program." *Id.* at 587, 961 P.2d 1190.

39. Clearly the EAP counselor found herself caught between the duty of confidentiality she owed Garcia and the hospital's disclosure rule. The court made the statement, presumably gleaned from the record or from an inference based on the counselor's discussion with the supervisor, that "[t]he EAP counselor was concerned for the welfare of patients in the hospital after learning of Garcia's sexual problems," although he had made no explicit threats toward identifiable victims. *Id.* at 580, 961 P.2d at 1183 (majority opinion). At the time of Garcia's revelation, no state law rendered the communication privileged. *Id.* The court concluded that "the EAP counselor had a duty to disclose the information to others at the hospital. As the employer of the EAP counselor, the hospital is responsible for the failure of the EAP counselor to do so." *Id.* This aspect of *Garcia's* holding has been changed by title 44, section 202 of the Idaho Code. The dissent, following *inter alia* title 6, section 1902 of the Idaho Code, enacted after the incident, would have found no duty because no specific victim was identified by Garcia, no explicit threat was made, no expert testimony established that the counselor had violated the standard of care, and the counselor had no administrative duties. *Id.* at 582-92, 961 P.2d at 1185-95 (Schroeder, J., dissenting).

ployees to consume alcohol.⁴⁰ He was “reprimanded”⁴¹ or “warned” for this behavior.⁴² The court did not use this incident to hold that there was a genuine issue of material fact concerning the hospital’s negligent supervision of Garcia, but rather based the holding on “the knowledge the hospital had through the EAP counselor of Garcia’s sexual propensities.”⁴³

The district court was unsympathetic to Doe’s case against the hospital. Initially the court granted summary judgment in favor of the hospital for lack of proximate cause.⁴⁴ This was reversed and remanded by the Idaho Court of Appeals for further discovery.⁴⁵ Eventually the defendant again moved for summary judgment, which was again granted by the district court because, “as a matter of law, the results in this case were not reasonably foreseeable.”⁴⁶ The district court stated that the issue turned on the lack of duty or, alternatively, “upon the limitation of liability as a matter of legal policy based on the attenuation of the chain of proximate causation.”⁴⁷ Call it duty or call it proximate cause, the district court was against allowing the plaintiffs to proceed to trial on the matter of the hospital’s liability. When the matter reached the Idaho Supreme Court, Justice Schroeder agreed, reprinting the district court’s opinion; but the other four members of the court disagreed, vacating the summary judgment and remanding for further proceedings below.

B. *Hunter v. State Department of Corrections*

Corey Hood was on probation after pleading guilty to statutory rape in a case that had included allegations of forcible rape of a child under eighteen.⁴⁸ He was rated at the maximum level of probation su-

40. *Id.* at 579, 961 P.2d at 1182 (majority opinion).

41. *Id.*

42. *Id.* at 583, 961 P.2d at 1186 (Schroeder, J., dissenting).

43. *Id.* at 580, 961 P.2d at 1183 (majority opinion). Title 44, section 202(2) of the Idaho Code, subsequently enacted in 1999, states that “No employer shall be held liable in any degree on the basis of any communication between [an employee] and [an EAP counselor] unless the employer actually knew, or should have known, of the information communicated before the alleged breach of duty or harm occurred.” IDAHO CODE ANN. § 44-202(2) (2003).

44. *Garcia*, 131 Idaho at 588, 961 P.2d at 1191 (Schroeder, J., dissenting).

45. *Doe v. Sisters of the Holy Cross*, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995).

46. *Garcia*, 131 Idaho at 588, 961 P.2d at 1191 (Schroeder, J., dissenting).

47. *Id.*

48. *Hunter v. State Dep’t of Corr.*, 138 Idaho 44, 46, 57 P.3d 755, 757 (2002). The State of Idaho vigorously denied this in its appellate brief, noting that Hood had never been charged with anything other than statutory rape. Reply Brief of the Appellant State of Idaho at 1–2, *Hunter*, 138 Idaho 44, 57 P.3d 755 (Nos. 26556 & 26578), 2001 WL 34648827 [hereinafter State Reply Brief].

pervision.⁴⁹ His probation officer, Kim Spevak, was fully aware of the record.⁵⁰

As a condition of probation, Hood had to find work.⁵¹ He eventually found work at Mr. Gas and Mr. Wash ("Mr. Wash"), a car wash in Burley.⁵² Spevak met with Hood's supervisor, informing her "that Hood was on probation for a sexual offense and was not to interact with minors. Spevak did not inform the supervisor of the precise nature of Hood's conviction."⁵³

Hood performed fine on the job at Mr. Wash and was promoted to supervisor.⁵⁴ Wendy Hunter was also an employee at Mr. Wash.⁵⁵ Hunter was seventeen-years-old, although the supervisors at Mr. Wash did not know Hunter's age.⁵⁶ Various employees observed Hunter talking and joking with Hood on several occasions, but Mr. Wash was evidently a lively place where the employees talked, joked, and even flirted.⁵⁷ No Mr. Wash employees were aware that Hood and Hunter socialized outside of their employment.⁵⁸

Wendy Hunter quit her job at Mr. Wash.⁵⁹ Six weeks later she drove with Hood, in his girlfriend's car, to his living place in Burley.⁶⁰

49. *Hunter*, 138 Idaho at 46, 57 P.3d at 757.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*; see also Brief of Defendant/Appellant/Cross-Respondent James C. Lynch, DBA Mr. Gas & Mr. Wash at 8, *Hunter*, 138 Idaho 44, 57 P.3d 755 (Nos. 26556 & 26578) [hereinafter Mr. Wash Brief].

54. Mr. Wash Brief, *supra* note 53, at 9.

55. *Hunter*, 138 Idaho at 46, 57 P.3d at 757.

56. *Id.*

57. See *id.* The court made the following unnecessary observation about Wendy Hunter, a dead seventeen-year-old child: "Although [co-workers] had seen Hunter 'flirting' with Hood, employees testified that Hunter flirted with most male employees at Mr. Wash." *Id.* This factual assertion was seized upon by James C. Dale & Keasa L. Hollister, *Court Rejects Employer's Liability for Criminal Act by Off-Duty Employee*, 7 No. 8 IDAHO EMP. L. LETTER 1, Nov. 2002. The court plucked this fact out of the appellants' reply brief, Reply Brief of Defendant/Appellant/Cross-Respondent James C. Lynch, DBA Mr. Gas & Mr. Wash at 5, *Hunter*, 138 Idaho 44, 57 P.3d 755 (Nos. 26556 & 26578) [hereinafter Mr. Wash Reply Brief], even though the same witness testified that "all of the Mr. Wash employees talked and joked with one another while they were working." *Id.* at 3. That testimony would have conveyed the same point without causing the sniggering and eye-rolling that will greet this sentence every time the case is read.

58. Mr. Wash Reply Brief, *supra* note 57, at 5. There is some discrepancy here. Plaintiff's brief states that an employee did see Hunter and Hood kissing. Brief of the Respondents/Cross-Appellants Relating to Defendant/Appellant/Cross-Respondent Lynch at 2, *Hunter*, 138 Idaho 44, 57 P.3d 755 (Nos. 26556 & 26578).

59. *Hunter*, 138 Idaho at 46, 57 P.3d at 757.

Together they smoked marijuana, watched a movie, and had sex.⁶¹ Then, "because he was bored," he knocked her unconscious and cut her throat. He dumped her body in the desert.⁶² It turned out that Hood had killed his grandmother a few weeks earlier.⁶³

Wendy Hunter's parents filed a wrongful death action against Mr. Wash for negligence and against the State of Idaho for "negligent supervision of Hood during his probation."⁶⁴ The case went to trial and "[t]he jury returned a verdict of \$1.8 million."⁶⁵ Negligence was apportioned as follows: "Earl Hunter, 1%; Wendy Hunter, 4%; Mr. Wash, 20%; the State, 35%; and Hood, 40%."⁶⁶

The Supreme Court of Idaho reversed as to all defendants.⁶⁷

C. *Hei v. Holzer*

Melissa Hei was a student at Kellogg High School. Beginning when she was seventeen-years-old, during the fall of her junior year, her relationship with her teacher, coach, and family friend, Mark Holzer, was flirtatious and involved "express[ing] feelings" for each other.⁶⁸ In December 1995, she turned eighteen. One month later, in January 1996, the relationship turned sexual. Within weeks rumors were brought to the attention of the school administration, which began investigating.⁶⁹ In late June, the principal got definitive information "that sexual contact [had] occurred. Holzer resigned the next day."⁷⁰

60. *Id.*; Brief of the Appellant State of Idaho at 6, *Hunter*, 138 Idaho 44, 57 P.3d 755 (Nos. 26556 & 26578) [hereinafter *State Brief*].

61. *State Brief*, *supra* note 60, at 6. The court characterizes their sexual relations as "rape," possibly because of her age, or possibly because of evidence of forcible intercourse. *Hunter*, 138 Idaho at 46, 50, 57 P.3d at 757, 761.

62. *State Brief*, *supra* note 60, at 6.

63. *Id.* at 5.

64. *Hunter*, 138 Idaho at 46, 57 P.3d at 757.

65. *Id.*

66. *Id.* This astonishing finding, allocating only 40% of the fault to the murderer, is discussed *infra* note 298.

67. Regarding the State's liability, the court found that "there [was] not substantial and competent evidence to support the jury verdict that the state was reckless, willful and wanton in its supervision of Corey Hood," because plaintiffs did "not establish a high likelihood that Hood would murder." *Hunter*, 138 Idaho at 49-50, 57 P.3d at 760-61.

68. *Hei v. Holzer*, 139 Idaho 81, 84, 73 P.3d 94, 97 (2003).

69. *Id.* During the course of this investigation, Holzer, according to his own testimony, "flat out lied" to district personnel. Respondents' Joint School District No. 391, Curry and Weir's Brief at 22, *Hei*, 139 Idaho 81, 73 P.3d 94 (No. 26968), 2001 WL 34646976 [hereinafter *Sch. Dist. Brief*]. At that point none of the parties wanted the matter made public. *Id.*

70. *Hei*, 139 Idaho at 84, 73 P.3d at 97.

Hei and her parents brought seventeen causes of action against Holzer, his wife, and the school district.⁷¹ The district court granted summary judgment to the Holzers and the school district. The Heis appealed to the Idaho Supreme Court.⁷²

Because Hei was eighteen at the time of sexual contact, Holzer had committed no crime.⁷³ A threshold question was whether a tort was committed.⁷⁴ Justice Walters thought not, as the parties were consenting adults.⁷⁵ Hei attempted to articulate that she had a consti-

71. These included battery, assault, seduction, breach of contract, negligence per se, mental distress, negligent infliction of emotional distress, sexual harassment, and sexual molestation in addition to the claims discussed in the text above. Sch. Dist. Brief, *supra* note 69, at 27. Many of these claims were unsubstantiated at the time the matter went before the Supreme Court, so the court upheld the trial court's grant of summary judgment. *Hei*, 139 Idaho at 88, 73 P.3d at 101. The seduction claim might have been interesting to consider, but it was apparently abandoned. See generally *Seamons v. Spackman*, 81 Idaho 361, 341 P.2d 442 (1959); IDAHO CODE ANN. § 5-308 (2004).

72. *Hei*, 139 Idaho at 84, 73 P.3d at 97.

73. *Id.* at 85, 73 P.3d at 98. His teaching certificate was not revoked, but was suspended for two years by an ethics panel, and he was obliged to undergo psychological care and to do community service. Julie Titone, *Teacher May Get Job Back: Ethics Panel Won't Revoke Certificate for Student Affair*, SPOKESMAN-REVIEW, Feb. 28, 1997, at B1. The refusal of the panel to permanently revoke his license was influenced by: his tearful repentance, the support of the Hei's parents, and his wife's support and corroboration that their marriage was in trouble at the time of his relationship with the student. The basis for the panel's finding was "a counselor's conclusion that Holzer had no longstanding pattern of behavior involving young women" and was not "pathologically attracted to young girls [and did not] fantasize[] about relationships." *Id.*

74. Hei's position, according to a contemporary news article, was that Holzer's "persistent sexual advances amounted to rape." Julie Titone, *Woman Files Suit Against Ex-Teacher: Says Sexual Relationship with Former Kellogg High School Instructor Amounted to Rape*, SPOKESMAN-REVIEW, Mar. 19, 1997, at B1. Hei accused Holzer of abuse of power and "a frequent pattern of taking advantage of his employment position and initiating and demanding sexual contact with Melissa Hei." *Id.* "As a result of that pressure, the suit claimed, Hei was incapable of giving her legal consent to sexual relations, which began after she turned 18 years old." *Id.* Additionally Hei produced the affidavit of a psychologist that she was "unable to freely, knowingly and voluntarily consent to sexual relationships with Mark Holzer," and that she was "groomed" by Holzer. Appellant's Brief at 5, 11, *Hei*, 139 Idaho 81, 73 P.3d 94 (No. 26968). Without consent, the sexual intercourse became criminal. *Id.* at 11. Further, Holzer's marriage rendered the relationship adulterous. Neither the court nor this article addresses whether a criminal act, see IDAHO CODE ANN. § 18-6601 (2004), and/or a breach of moral duty to a spouse should give rise to a tort duty.

75. *Hei*, 139 Idaho at 89, 73 P.3d at 102 (Walters, J., dissenting). It is beyond the scope of this article to address liability of teachers for flirtation, romance, or sex with their students. Justice Walters was concerned that "[t]he ruling in this case will create liability for illicit affairs between adult students and adult instructors not only in Idaho's high schools but also in its colleges and universities." *Id.* The unanimous court agreed

tutional right that was violated. The court could find no such right, especially since she had attained the age of majority.⁷⁶

Hei had some success on her other causes of action against the school district. The court overturned the summary judgment, and remanded the question of the school district's liability under Title IX of the Education Amendments of 1972.⁷⁷ Title IX makes it illegal for schools and their agents to discriminate on the basis of sex.⁷⁸ This basic proscription has developed into a proscription against sexual harassment,⁷⁹ for which a private right of action for compensatory damages has been judicially established.⁸⁰ The school district's liability was predicated on its "[a]ctual knowledge of, and deliberate indifference to, the teacher's . . . conduct."⁸¹ Because there was a factual dispute about what the district knew and when, the court would not allow summary judgment. The focus of the claim was the district's own deliberate indifference, not vicarious liability or even constructive notice.⁸²

Hei's remaining two causes of action were closely linked, and the court noted that she "blend[ed]" them together.⁸³ The court tried to separate them. One was a claim that the district failed to supervise Hei herself, as a student.⁸⁴ The other was a claim that the district failed to supervise Holzer, as an employee and teacher.⁸⁵ These claims were for breach, by the school district, of a duty it owed directly to plaintiff Hei.

Hei's claim that the school district owed a duty to protect and supervise *her* was barred by the immunity clause of title 6, section 904A of the Idaho Code, making an exception to governmental liability

that the duty of care owed by teachers to students did not include "a duty for students who have reached the age of majority and entered into a consensual relationship with a teacher that is otherwise legal." *Id.* at 85, 73 P.3d at 98 (majority opinion). The court did not make any reference to any teacher code of conduct that was broken by Holzer, although the matter is mentioned in the briefs. See Respondent Holzer's Brief at 2, *Hei*, 139 Idaho 81, 73 P.3d 94 (No. 26968), 2001 WL 34644326; Affidavit in Support of Memorandum in Opposition to the District Defendant's Motion for Summary Judgment at 117-18, *Hei*, 139 Idaho 81, 73 P.3d 94 (No. CV-97-33519).

76. *Hei*, 139 Idaho at 86, 73 P.3d at 99.

77. *Id.* at 88-89, 73 P.3d at 101-02.

78. 20 U.S.C. § 1681 (2000).

79. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992). For a quick overview, see Martha McCarthy, *Students as Targets and Perpetrators of Sexual Harassment: Title IX and Beyond*, 12 HASTINGS WOMEN'S L.J. 177 (2001).

80. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

81. *Hei*, 139 Idaho at 87, 73 P.3d at 100 (citing *Gebser*, 524 U.S. at 285).

82. *Gebser*, 524 U.S. at 291.

83. *Hei*, 139 Idaho at 87, 73 P.3d at 100.

84. *Id.*

85. *Id.*

“aris[ing] out of injury . . . by a person under supervision, custody or care of a governmental entity.”⁸⁶ The court reasoned that Hei, as a consensual party to the relationship with Holzer, in effect injured herself. She was under the district’s “supervision, custody, or care,” she therefore could not recover against the district.⁸⁷

Although section 6-904A precluded liability for the duty to supervise Hei herself, the court ultimately concluded that the school district did owe a duty of care to supervise its teacher, Holzer, because of title 33, section 512(4) of the Idaho Code.⁸⁸ That section charges school districts with the duty “to protect the morals and health of the pupils.”⁸⁹ Based on this duty, the court found that the district had a duty to supervise its teacher Holzer.⁹⁰ The immunity of section 6-904A did not

86. IDAHO CODE ANN. § 6-904A(2) (2004).

87. *Hei*, 139 Idaho at 87–88, 73 P.3d at 100–01. The court cited *Brooks v. Logan*, 130 Idaho 574, 577, 944 P.2d 709, 712 (1997), *superseded by statute*, IDAHO CODE ANN. § 33-512B (2001), *as recognized in* *Carrier v. Lake Pend Oreille Sch. Dist.* No. 84, 142 Idaho 804, 134 P.3d 655 (2006) (holding no liability to the school district for a high school student who committed suicide). The *Hei* court’s interpretation of section 6-904A took the provision much further than it had been taken before. The court held in *Harris v. State Department of Health & Welfare*, 123 Idaho 295, 299, 847 P.2d 1156, 1160 (1992), that the purpose of the section “was intended to render the state immune from the *unpredictable* acts of third persons.” *See also* *Coonse ex rel. Coonse v. Boise Sch. Dist.*, 132 Idaho 803, 806, 979 P.2d 1161, 1164 (1999) (holding school district immune from liability to third grader assaulted by older school boys). In *Coonse* the court stated, “It is clear that the immunity arises from the status of the person(s) causing the injury, not the status of the person injured.” *Id.*

Here, Hei was not a third party, she was the primary party, and her reaction was all too predictable—she got into a sexual relationship with a teacher who had begun flirting with her when she was a minor. Taken alone, the rigid circularity of this argument borders on the absurd: the district does not have to supervise her because it was supervising her, it does not have to control her because it was controlling her, it does not have to care for her because it was caring for her. But in context, the court was setting a bright line at her eighteenth birthday: once that magic date passed, she could consent to sexual relations, and so be it. The court does seem astonishingly blind to the romantic preamble to the sex, which occurred when she was still a minor. The court was worried that if it held otherwise, liability would extend not only into the adult realm of college and university romance, but also into teenage suicides and the like.

88. *Hei*, 139 Idaho at 88, 73 P.3d at 101; IDAHO CODE ANN. § 33-512(4) (2006).

89. § 33-512(4). This narrowly proscribed statutory duty has played a part in decisions ranging from sexual abuse by a teacher, *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986), assault by fellow classmates, *Coonse*, 132 Idaho 803, 979 P.2d 1161, and sending away an ambulance that could have saved a student’s life, *Czaplicki v. Gooding Joint Sch. Dist.* No. 231, 116 Idaho 326, 775 P.2d 640 (1989). In *Hei*, the court carefully steers clear of creating any negligence per se, expanding the cause of action, or creating a new claim.

90. *Hei*, 139 Idaho at 88, 73 P.3d at 101.

apply because Holzer was not "under the supervision" of the district in the sense of "supervision" intended by the statute. The *Hei* court explained that title 33, section 512 of the Idaho Code does not create a negligence per se duty, nor does it create a separate tort or a new cause of action.⁹¹ In fact, upon review of the cases, it may be more accurate to say that section 33-512 "exemplifies" the already extant common law duty.⁹² Based on this duty—characterized by the *Hei* court as "some type of duty of care [owed] to Hei"⁹³—the court remanded for further proceedings on the negligent supervision of its teacher Holzer.⁹⁴

To recap, the *Hei* court made some fine distinctions. The district was immune, under section 6-904A, from a charge that it should have supervised Hei to keep her from hurting herself. But, by virtue of the duty owed her under title 33, section 512, the district did owe an obligation to supervise and control its own employee. The district also owed her a Title IX duty.⁹⁵

A final factual uncertainty may have colored the court's view of this entire matter. The school district's link as the actual cause of the sexual affair was not clearly ascertainable. In this close-knit community, the Heis and the Holzers were good friends. Holzer's wife invited Hei into their home.⁹⁶ Their families shared Christmas.⁹⁷ Actual, "but

91. *Id.*

92. *Brooks*, 127 Idaho at 490, 903 P.2d at 79. Note the variety of verbs used by the *Brooks* court in this passage:

Previously, we have ruled that when the legislature enacted [Idaho Code section] 33-512(4), it *created* a statutory duty which requires a school district to act reasonably in the face of foreseeable risks of harm. We again discussed this statutory duty in *Bauer v. Minidoka [School District] No. 331*, 116 Idaho 586, 778 P.2d 336 (1989). In that opinion we noted that this statutory duty *exemplifies* the role of the state to the children in school, which is a role described as one *in loco parentis*. We quoted favorably from a Washington opinion which pointed out that "the duty a school district owes to its pupils is '[t]o anticipate reasonably foreseeable dangers and to take precautions protecting the children in its custody from such dangers.'"

Thus, under our previous case law we have determined that a school district has a duty, *exemplified* in [Idaho Code section] 33-512(4), to act affirmatively to prevent foreseeable harm to its students.

Id. (emphasis added) (citations omitted).

93. *Hei*, 139 Idaho at 88, 73 P.3d at 101 (citing § 33-512).

94. *Id.* at 88–89, 73 P.3d at 101–02.

95. *Id.* at 87, 73 P.3d at 100.

96. Titone, *supra* note 73. At the hearing on his teaching certificate, "[h]is wife . . . cried as she spoke on his behalf, blaming herself for bringing the young woman into their home." *Id.*

97. Sch. Dist. Brief, *supra* note 69, at 5.

for" cause was uncertain. Perhaps the family connections would have provided enough opportunity for the sexual relationship to proceed, rendering the flirtation at school merely incidental.

III. SOURCES AND SCOPE OF DUTY

A. By Employing, Employers Have Affirmatively Undertaken to Act, and Must do so with Due Care to Avoid Foreseeable Harm

The most basic source of duty is undertaking to act. If one undertakes, actively, to act, one must do so with due care. The vivid image of *Keim v. Gilmore & Pittsburg R.R.*⁹⁸ illustrates this point. A steam shovel car on a moving train with a projecting jackarm struck a truck and "threw it with violence" against the plaintiff.⁹⁹ "The whole trouble in this matter lay with those who were operating the train. If they were going to pull a car over the road with projections on the sides" they needed to take precautions.¹⁰⁰ The general rule is that if one acts, one must act in such a way as to minimize, to a reasonable extent, the foreseeable risks of one's actions.

This is particularly true when one is on notice of the particular risks of one's actions. In *Keim* the jackarm was protruding "eleven to twenty-two inches farther out than any of the cars usually transported over the road."¹⁰¹ Other people in the area would not have expected the additional protrusion. The Idaho Supreme Court italicized the proscription that the railroad should have taken steps, like providing a "lookout to prevent accidents from the special hazard of this car."¹⁰² This language is an articulation of the scope of the duty, telling defendants in general terms what they needed to do; in this case, prevent accidents from the special hazard of what they had set in motion. Otherwise, they can be faulted for misfeasance.¹⁰³

Nonfeasance, refraining from action, doing nothing, is 180 degrees removed from setting something in motion or undertaking to act. There is no obligation imposed by tort law to undertake to act, even in the face of highly preventable, highly foreseeable harm to an-

98. 23 Idaho 511, 131 P. 656 (1913).

99. *Id.* at 516, 131 P. 658.

100. *Id.* at 518, 131 P. 658.

101. *Id.*

102. *Id.* at 519, 131 P. 659.

103. *Id.* at 520-21, 131 P. at 658-59.

other.¹⁰⁴ In the cases at issue in this article, the employers did undertake to act by hiring their employees, but they certainly did not engage in the undesirable behavior of the employees. The employees' acts were entirely out of the scope of employment and went way beyond negligence into crimes, intentional torts, or certainly what most people would call "bad actions."¹⁰⁵ It has been established, across the nation and in Idaho, that noncriminal third parties can be held liable for negligently allowing crimes and intentional torts to occur, especially when the third parties have a special relationship with the criminal tortfeasor, the victim, or both.¹⁰⁶

In the world of torts, the plaintiff must establish a duty running with some specificity to himself. "A robust conception of duty, as an independent element in the negligence action, reflects the original concern of tort law with a conception of civil obligation—a responsibility of some, but not all, actors to take care to act reasonably so as not to injure certain others."¹⁰⁷ A fairly recent Idaho case, *Rife v. Long*,¹⁰⁸ summed up well-known factors used across the nation to establish duty.

Determining whether a duty will arise in a particular instance involves a consideration of policy and the weighing of several factors which include:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

104. *Rees v. State Dep't Health & Welfare*, 143 Idaho 10, ___, 137 P.3d 397, 402–03 (2006).

105. The Idaho Supreme Court concluded that neither a crime nor a tort was committed by the married high school teacher who had sex with the eighteen-year-old student. *But see infra* notes 301–02. However, the adultery, the lies, and the disparities in age between the parties would strike most of us as undesirable and potentially psychologically injurious.

106. *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673 (1999); *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999); *Udy v. Custer County*, 136 Idaho 386, 391, 34 P.3d 1069, 1074 (2001).

107. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 322 (expanded ed. 2003).

108. 127 Idaho 841, 908 P.2d 143 (1995).

With respect to the foreseeability of the harm, this Court has stated:

[F]oreseeability is a flexible concept which varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required.¹⁰⁹

A finding of duty does not amount to a finding of breach of duty. But a finding of duty does often require the defendant to have his actions or omissions scrutinized by a jury.¹¹⁰ A jury will deliberate over what courses of action were open to defendant, and at what cost. If the choices defendant made did not match up to applicable standard of behavior, the defendant will be found to have breached the duty.

The jury must then find a link between breach of duty and the damage. The causal link must be factual, and then the legal questions of proximate cause must be addressed: Is this defendant responsible for this harm? Was there a natural, direct connection between cause and effect? Could the harm have been foreseen by a prudent person? If so, then liability should attach.

In other words, a finding of duty merely begins the analysis of whether a tort was committed. Breach, actual cause, proximate cause (scope of responsibility), damage, and plaintiff's fault, if any, must also be addressed before liability is imposed. While these elements are analytically distinct from duty, when judges are making duty determinations they often let their minds run through the rest of the case. The duty factors set out in *Rife* include some preliminary contemplation of matters affecting breach (foreseeability of plaintiff's harm, the extent of the burden to the defendant and community if liability is found) and actual and proximate cause (the closeness of the connection between the defendant's conduct and the injury suffered).¹¹¹

109. *Id.* at 846–47, 908 P.2d at 148–49 (citations omitted).

110. The question of breach will not be submitted to the jury if one or the other party can establish negligence, or the absence of negligence, as a matter of law. *S. H. Kress & Co. v. Godman*, 95 Idaho 614, 515 P.2d 561 (1973).

111. *Rife*, 127 Idaho at 846, 908 P.2d at 148.

B. The Duty to Control

Employers control their employees. Employers hire the employees, creating the relationship and choosing to “be the boss” of another individual. Hiring is an affirmative act. Employers then train, supervise, guide, and discipline their employees. The presumption in Idaho, as in other American states,¹¹² is that the employee is at will and can be discharged even without good cause. There is a tort duty to hire, train, and supervise with due care, or, as it is often phrased in the negative, to avoid negligent hire and supervision. The vicarious liability of respondeat superior and agency law do not technically involve separate duties owed from the employer to the victim, but have the effect of providing an incentive for the employer to exercise control over employees.

1. Respondeat Superior

The courts of Idaho are not strangers to the question of whether employers are responsible for the torts and crimes of their employees. The basic rule of respondeat superior¹¹³ is that a master, or employer, is liable for the torts of the servant, or employee, committed during the course of employment. This is a form of vicarious liability, not an independently owed tort duty. The corollary of respondeat superior was addressed by the Idaho Supreme Court in *Normington v. Neely* in 1937: “[A] master is not liable if the tort of the servant which caused the injury occurred while the servant was engaged in some private matter of his own, or outside the legitimate scope of his employment, and without specific authority from the master.”¹¹⁴ Similarly, “if the servant commits a wrongful act without authority, and not for the purpose of executing the orders or doing the work of his master, the latter is not responsible therefor.”¹¹⁵

For example, in that case a cab driver had assaulted a competitor, who then sued and received judgment against the cab company. The court reversed because the assault occurred off duty, even though the dispute leading to the assault began when the driver was on duty,

112. Except Montana. See *Wrongful Discharge from Employment Act*, MONT. CODE ANN. § 39-2-901 to -915 (2005).

113. Respondeat superior is Latin, meaning “let the master answer.” *Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 944, 854 P.2d 280, 287 (Ct. App. 1993) (quoting BLACK’S LAW DICTIONARY 1311 (6th ed. 1990)); see also *Rausch v. Pocatello Lumber Co.*, 135 Idaho 80, 14 P.3d 1074 (Ct. App. 2000).

114. 58 Idaho 134, 140–41, 70 P.2d 396, 398 (1937).

115. *Id.* at 140, 70 P.2d at 398.

the dispute related to work, and the driver was the owner's son.¹¹⁶ But the driver was not on duty and was not engaged in the service of his employer, and "[i]t cannot be said that the employment of a man to drive a taxicab contemplates committing an assault or battery, either in the course of procuring passengers or preventing a competitor from procuring them."¹¹⁷ The cab company would not be liable unless the owner "advised, aided, abetted or encouraged the assault."¹¹⁸

Turning the *Normington* rule into a more positive statement, the employer is liable in respondeat superior if the employee was acting within the legitimate scope of employment or with specific authority. The primary question is whether the employee is acting within the scope of employment or with a purely personal purpose. The Idaho Supreme Court and Court of Appeals have provided considerable guidance on this point.

[I]f the employee's purpose is purely personal, it does not matter that the employee is using the employer's tools or driving the employer's vehicle or some other activity that merely re-

116. *Id.* at 136–38, 70 P.2d at 396–97. "[T]he father was under no more legal responsibility to restrain [his twenty-nine-year-old son] from committing a battery than he was to restrain any stranger from so doing; and he was certainly not liable, as a joint tortfeasor, for any battery he might commit, unless he advised, aided, abetted, or encouraged the assault or had previously counseled the violence." *Id.* at 142, 70 P.2d at 399. Because of a prejudicial instruction to the contrary, the judgment for plaintiff was reversed and a new trial granted. *Id.*

This father can be contrasted to the parents of the vicious sixteen-year-old, who knew of his propensities and encouraged him, thereby

constitut[ing] assent and participation on the part of the parents in the tort alleged, and, if so, it would be regarded as negligence upon the parents' part. It may be a question of fact as to whether the child knew of his parents resenting any resistance or admonition made by other adult persons whose children were also beaten and maimed, for to encourage the child the parents must signify their consent to a continuation of their child's conduct, or direct or ratify the act, or that the child was at the time acting as their agent or servant in their interests or for their benefit. Under such circumstances the parent would be liable under the doctrine of adoption of tort.

Ryley v. Lafferty, 45 F.2d 641, 642 (D. Idaho 1930); see also *infra* notes 146–66 and accompanying text.

117. *Normington*, 58 Idaho at 139, 70 P.2d at 398.

118. *Id.* at 142, 70 P.2d at 399. Conflicting evidence had been presented about the owner father. One assertion was that he had discouraged the son from pursuing the matter or resorting to fisticuffs, and had offered the sage advice to go home and go to bed. Other evidence had the father yelling, "Go get him, Charlie." *Id.* at 138–39, 70 P.2d at 397–98.

sembles his or her employment. The employee must be engaged in some type of work that is assigned to him or her in the general sense of doing something to serve the employer.

....

... [I]t is apparent that serving the "master" is required in order for the conduct to be within the scope of employment.¹¹⁹

"Serving the master" encompasses

those acts which are so closely connected with what the servant is supposed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of employment.

....

An employee's purpose or intent, however misguided in its means, must be to further the employer's business interests. If the employee acts from "purely personal motives . . . in no way connected with the employer's interest" . . . then the master is not liable.¹²⁰

The employee's purpose is a question of fact for the jury.¹²¹ The employee who pulls a chair out from another as a prank does not subject the employer to liability.¹²² Nor was the Legal Aid Society responsible for the malpractice of a moonlighting attorney¹²³ because the at-

119. *Wooley Trust v. DeBest Plumbing Inc.*, 133 Idaho 180, 184, 983 P.2d 834, 838 (1999). The more colorful phrase, "frolic and detour" does not appear in Idaho jurisprudence, according to a Westlaw search.

120. *Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 944-45, 854 P.2d 280, 287-88 (Ct. App. 1993) (quoting *Birkner v. Salt Lake County*, 771 P.2d 1053, 1056-57 (Utah 1989)) (citations omitted).

121. *Id.* at 945, 854 P.2d at 288.

122. *Rausch v. Pocatello Lumber Co.*, 135 Idaho 80, 85, 14 P.3d 1074, 1079. Tragic horseplay or "skylarking" resulted in death in *Scrivner v. Boise Payette Lumber Co.*, 46 Idaho 334, 340-42, 268 P. 19, 20-21 (1928). If the employee had stepped out of the character of a servant, respondeat superior liability would have been precluded. *Id.* at 348, 268 P. at 23.

123. *Podolan*, 123 Idaho 937, 854 P.2d 280.

Donnelly and the Podolans had an eight year attorney-client relationship in which Donnelly purported to represent them in two lawsuits. Through an elaborate series of lies, forged court documents, false preparations for trial, and false visits to the courthouse, Donnelly led the Podolans into believing he

torney was not motivated by a desire to serve Legal Aid.¹²⁴ Nor does a son, whose father was his employer, subject his father to liability, if the son was at his parents' house only to deliver radishes to his mother.¹²⁵

Respondeat superior also applies when the employee is acting outside the normal scope of employment but pursuant to the employer's direction or authority. The most obvious kind of authority is express or actual direction by an employer to an employee.¹²⁶ This has been fairly strictly applied in some cases. For example, in *Smith v. Thompson*, an impressionable young man idolized his employer.¹²⁷ Several times the employer expressed to the young man his desire to see a neighbor's ramshackle house burned down.¹²⁸ The employer never "specifically told [the employee] to burn down the house, but during the conversation, he mentioned that if someone were to burn down the house, it should be done while [he] was out of town so that he would not get blamed."¹²⁹ The young man eventually did burn down the house, and the neighbors sued. The court rejected respondeat superior liability because house burning was not within the scope of the

was pursuing their cases when he was not. His misrepresentations were apparently due to a mental illness rather than a desire for personal gain, but nonetheless, the Podolans were injured.

Id. at 940, 854 P.2d at 283.

124. The court allowed the respondeat superior question to be resolved by looking at the malfeasing attorney's intention rather than by a more objective standard, especially when the attorney was mentally ill. *Id.* at 945, 854 P.2d at 288. A later case, *Wooley Trust v. DeBest Plumbing, Inc.*, established that testimony from the employer about his opinion on whether or not the employee was within the scope of authority is improper and invades the province of the jury. 133 Idaho at 186, 983 P.2d at 840. In *Podolan*, the court looked at the contract between the attorney and the employer, discussions between the attorney and the employer, the conditional order of reinstatement from the bar, and the employer's malpractice policy, which covered services performed only for the employer. 123 Idaho at 945, 854 P.2d at 288.

125. *Casey v. Sevy*, 129 Idaho 13, 19, 921 P.2d 190, 196 (Ct. App. 1996). Plaintiff was injured as the son and employee was driving away from his parent's house. The coming and going rule of worker's compensation cases is also applied in third party negligence actions brought against employers on a theory of respondeat superior. *Id.* at 17, 921 P.2d at 194. But no liability should attach if the employee was outside the scope of his employment. *Id.* at 18, 921 P.2d at 195.

126. See *DeBest Plumbing, Inc.*, 133 Idaho at 184, 983 P.2d at 838 (disavowing a strict requirement that work be assigned).

127. 103 Idaho 909, 910, 655 P.2d 116, 117 (Ct. App. 1982).

128. *Id.*

129. *Id.* at 910-11, 655 P.2d at 117-18.

employee's job, nor was there specific direction to burn down the house.¹³⁰ However, the employer was held liable as a joint tortfeasor.¹³¹

Respondeat superior liability is a form of vicarious liability,¹³² meaning that it carries with it the financial liability for the employee's action but not the moral stigma of being deemed negligent, reckless, or criminal. Nonetheless the financial incentive to avoid liability deters the employer from ignoring the behavior of the employee. While it is analytically different from a duty owed to a plaintiff to control a third party perpetrator, respondeat superior creates the incentive to control the employee.

In our three cases, the perpetrators were off on frolics and detours ranging from immoral to heinous.¹³³ They were acting neither within their scope of employment nor pursuant to any direction or authority. Strict respondeat superior analysis is not applicable.

2. Agent Acting with Authority

Another source of employer liability can arise if the employee is acting as an agent with express, implied, or apparent authority.¹³⁴ This is closely related to respondeat superior, but is not exactly the same.¹³⁵ Certainly the agent acting under express or implied authority

130. *Id.* at 911, 655 P.2d at 118.

131. *Id.* at 912, 655 P.2d at 119. Sometimes the employee is doing just what the employer wants. If the employee is carrying out the employer's tortious or criminal purpose, the employer is of course liable in his, her, or its own right. The employer and the employee are joint tortfeasors, breaching the standard duty of care that each person or entity owes another. This was the situation in *Smith v. Thompson*. Similarly, in the case of the warring taxicab companies in *Normington v. Neely*, the company owner would have been liable as a joint tortfeasor if he had "directed, requested, or inspired the commission of the battery . . ." 58 Idaho 134, 141, 70 P.2d 396, 398-99 (1937).

132. *Rausch v. Pocatello Lumber Co.*, 135 Idaho 80, 83-84, 14 P.3d 1074, 1077-78 (Ct. App. 2000).

133. *See supra* Part II.

134. Courts recognize that a power dynamic exists in some relationships. In *Smith v. Thompson*, the court specifically mentioned the vulnerability of the young hired hand, who "was easily influenced by [the employer] and was over zealous in his desire to please the man who was a role model in his life." 103 Idaho 909, 912, 655 P.2d 116, 119 (Ct. App. 1982). On the other hand, the power dynamic between father and adult son was not enough to create liability in the father in *Normington*, 58 Idaho 134, 70 P.2d 396 (1937).

135. *See, e.g., Wooley Trust v. DeBest Plumbing, Inc.*, 133 Idaho 180, 983 P.2d 834 (1999). In *Wooley*, the court discussed respondeat superior and agency in the same section and did not treat the matter as an apparent authority case. *Id.* at 184-86, 983 P.2d at 838-40. Yet such a theory could well have been interesting to argue. In that case a plumber was informally approached about doing some work. *Id.* at 182, 983 P.2d at 836. He did not intend to charge for the work, either for his own gain or for his employer's, and the work was done after hours. *Id.* But he did take a company truck filled with company

can bind the principal, the employer. But more interesting are the cases of apparent authority. "Apparent authority exists where a principal voluntarily places an agent in a position where 'a person of ordinary prudence, conversant with the business usages and the nature of the particular business, is justified in believing that the agent is acting pursuant to existing authority.'"¹³⁶

In *Podolan*, the plaintiffs were the legal clients of a man posing as an attorney working for Legal Aid.¹³⁷ His malpractice and misrepresentations cost them a chance at a sex discrimination suit.¹³⁸ The attorney deceived Legal Aid of Idaho as well.¹³⁹ The Podolans sued Legal Aid.¹⁴⁰ Their apparent authority claim was dismissed because the Podolans had made statements belying any belief that they were Legal Aid clients.¹⁴¹ The court expected plaintiffs to use reasonable diligence to ascertain whether or not they were Legal Aid clients, which they had not done.¹⁴²

This line of cases is not apposite to the situations at hand, but it does highlight one aspect of *Garcia* and *Hei*. In those cases the employment relationship heightened the vulnerability of the child patient in the hospital and of the student (part of the time underage) at the high school.¹⁴³ A boy patient is told to do what the hospital professionals tell him to do; high school students are required to obey and respect their teachers.¹⁴⁴ Also in these cases, plaintiffs' fault figures into the analysis. Doe's parents and Hei (once she reached majority) were faulted, at least implicitly, for failing to perceive that something uncalled for was going on.¹⁴⁵

gas. *Id.* He was approached about the job during work time at the workplace by another employee. *Id.* The court upheld a jury verdict for the employer. *Id.* at 183, 983 P.2d at 837.

136. *Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 944, 854 P.2d 280, 287 (Ct. App. 1993) (citing *Clements v. Jungert*, 90 Idaho 143, 152, 408 P.2d 810, 814 (1965)); see also *Clark v. Gneiting*, 95 Idaho 10, 501 P.2d 278 (1972).

137. *Podolan*, 123 Idaho at 944, 854 P.2d at 287.

138. *Id.* at 940-41, 854 P.2d at 283-84.

139. *Id.*

140. *Id.*

141. *Id.* at 944, 854 P.2d at 287.

142. *Id.*

143. See *supra* Parts II.A-B.

144. See *supra* Parts II.A-B.

145. The vulnerability of the plaintiff was relevant to a finding of duty and ultimate findings of liability. See discussion *infra* Parts IV.A., IV.C.

3. Classic Relationships

Certain relationships are classically "special" and give rise to a duty to control.¹⁴⁶ One such relationship is that of parent and child. If a parent sits by and lets his child attack another person, the parent's failure to act may be scrutinized by a jury, and if his behavior was not reasonable, he will be deemed negligent. The liability of a parent for the torts of a child is not a vicarious liability like *respondeat superior*; at common law parents are *not* responsible for their children's torts.¹⁴⁷ Rather, the parent can be held liable for his or her own independent failure to *control*—the tort of negligent supervision¹⁴⁸—if the parent has knowledge of the child's propensity or proclivity for a specific harmful conduct and failed to take reasonable steps to guard against the foreseeable consequences of the child's propensity for that specific harmful conduct.¹⁴⁹ This is fairly strictly applied. For example, the case against a father who allowed his three-year-old daughter to play unattended by a snowmobile was dismissed on summary judgment because he was unaware of any particular propensity of the girl to climb and play on a snowmobile.¹⁵⁰ On the other hand, a lawsuit against parents of a sixteen-year-old was not dismissed on demurrer when the complaint alleged that they knew about, failed to constrain, and possibly encouraged their son of a "vicious and malignant disposition and the habit of persuading and inveigling smaller boys into secluded places . . . [for the purpose] of beating, bruising, maiming, and punishing."¹⁵¹

Dean Prosser, in his classic treatise on torts, describes duties owed by others besides parents, including the owner of an automobile

146. They often also give rise to a duty to protect. *See infra* Part III.D.

147. *Gordon v. Rose*, 54 Idaho 502, 509, 33 P.2d 351, 354 (1934) *cited with approval in Fuller v. Studer*, 122 Idaho 251, 254, 833 P.2d 109, 112 (1992).

148. *See Fuller*, 122 Idaho at 254–55, 833 P.2d at 112–13 (stating that a related cause of action, often brought concurrently, is negligent entrustment).

149. *See id.* at 252–53, 833 P.2d at 110–11 (holding that parents of three-year-old left unattended in snowmobile with engine running were not liable to person run over when the three-year-old pressed the throttle, because they were unaware of any propensity of the child to climb on snowmobiles); *see, e.g., Lopez v. Langer*, 114 Idaho 873, 761 P.2d 1225 (1988) (finding a father potentially responsible for entrusting his son with a poor driving record to drive a vehicle).

150. *Fuller*, 122 Idaho at 252, 255, 833 P.2d at 110, 113. The propensity of children to climb on things, including machines, and to push levers and knobs, coupled with evidence about what specifically went on that day, was insufficient, according to the majority, to allow the case to go to the jury. *But see id.* at 256–57, 833 P.2d at 114–15 (Bistline, J., dissenting).

151. *Ryley v. Lafferty*, 45 F.2d 641, 641 (D. Idaho 1930); *see also supra* note 116.

to control who is driving,¹⁵² the tavern keeper to prevent intoxicated patrons from injuring others,¹⁵³ the owner of property to control the conduct of anyone on the property “for the protection of those outside,” and, most importantly for our purposes, the “employer [to] prevent his employees from throwing objects from his factory windows.”¹⁵⁴ Idaho’s iteration of these classic duties has been summed up as follows:

Examples when an affirmative duty to control may arise include a parent’s duty to control his child, an employer’s duty to control an employee, or a law enforcement officer’s duty to control a dangerous prisoner. The common element in each of these is knowledge of an unreasonable risk of harm and the right and ability to control the third party’s conduct.¹⁵⁵

Thus, it is standard, traditional, and national law to hold that an employer has a duty to control an employee.¹⁵⁶

Control is the key. “For there to be a special relationship between the [defendant] and the third person, the [defendant] must have the ability and obligation to control the conduct of the third person.”¹⁵⁷ Put

152. PROSSER AND KEETON ON TORTS 383–84 (W. Page Keeton et al. eds., 5th ed. 1984).

153. *Id.* at 384.

154. *Id.*

155. *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673 (1999) (citing RESTATEMENT (SECOND) OF TORTS §§ 316, 317, 319 (1965)). Even if a relationship does not fall into the classical categories, another approach to determine sufficient “specialness” to create a “special relationship” for tort duty purposes is to examine the degree of control one party has over the other. See *Caldwell v. Idaho Youth Ranch, Inc.*, 132 Idaho 120, 124–25, 968 P.2d 215, 219–20 (1998) (finding that the dispositive fact was whether the Youth Ranch had custody (the ultimate form of control) of the third-party malfeasor).

156. James Dale describes this duty as “the kicker.” For his audience, that duty may be a kicker, or incentivizer, to vigilance, but it surely is not a surprise. James C. Dale, *What’s So Special About Duty of Care that Employers Have to Control Their Employees?*, 8 No. 5 IDAHO EMP. L. LETTER 1, Aug. 2003.

157. *Litchfield v. Nelson*, 122 Idaho 416, 420–21, 835 P.2d 651, 655–56 (Ct. App. 1992). Bonner County was not liable when it allowed a prisoner, serving a jail term for drunk driving, to drive himself to alcohol rehabilitation, even though his license was suspended. Two counties were involved, because the prisoner had been found guilty of DUI in both Bonner and Kootenai Counties and was serving concurrent sentences. The appellate court, the trial court, and the jury were willing to relieve the County of a finding of duty because of the technical chain of custody of the prisoner and the failure of the two neighboring counties to communicate. A third basis for justifying the lack of special relationship was that Bonner County officials had not witnessed the prisoner getting into his pick-up and driving away. *Id.* at 421, 835 P.2d at 656. This case, vindicating a “hear nothing, see nothing” bureaucracy, seems to fly in the face of the national authority creating a

in the abstract, this can sound rather circular: if you can and should control the person then you can and should control the person. But in practice, some distinctions may be drawn. A landlord did not owe a duty to monitor and control the activities of a tenant, even when the landlord and the tenants were linked in other ways, absent foreseeability of the type of incident that in fact happened, an affirmative assumption of a duty to protect plaintiff or her class, or a right of control over the third parties.¹⁵⁸ In that case, the court concluded that no right of control existed in the lease.¹⁵⁹ Lack of control became an argument for limiting liability.

Other limitations can be found in the common law as well.¹⁶⁰ Often the duty arises only if the dangerous propensity of the third party is known to the defendant, as was seen with the parental liability cases discussed above.¹⁶¹ In the line of negligent supervision cases led by *Sterling v. Bloom*, the duty arises only if the defendant knew or should have known of the likelihood that the third party will cause bodily harm to others if not controlled.¹⁶² So, in a later case, even though a youth ranch had knowledge that an inmate was physically

special relationship between prisoner and jailor. See PROSSER AND KEETON ON TORTS, *supra* note 152, at 376 ("There is now respectable authority imposing [some] duty . . . upon a jailer to his prisoner."); see generally RESTATEMENT SECOND § 314A(4) (one who takes custody of another).

158. See *Turpen*, 133 Idaho 244, 985 P.2d 669. Plaintiff's decedent died as a result of drinking too much in a home owned by defendant. Defendant was aware that raucous parties involving alcohol were held at the house but could not have foreseen that "a social guest would be killed by virtue of the guest's own lawful actions." *Id.* at 248, 985 P.2d at 673. Additionally, the court found no assumption of duty to protect plaintiff nor any right of defendant to control the tenants "apart from some responsibilities arising out of a lease agreement." *Id.* at 249, 985 P.2d at 674. This last finding was made despite defendant's ancillary relationship with the tenants—defendant's father managed the property and was also the college wrestling coach of the tenants and the victim (plaintiff's decedent). *Id.* at 246, 985 P.2d at 671.

159. *Id.* at 249, 985 P.2d at 674. Another theory might have worked in that case. The facts showed that defendant knew of the partying problem before renting to the tenants. Arguably, the failure to "control" arose at the time of entering into the rental agreement, making the transfer of possession of the premises akin to negligent entrustment. See DAN B. DOBBS, THE LAW OF TORTS § 325, at 880 (2000). Precedent from other jurisdictions establishes a landlord's duty to control a dangerous tenant, for example, one who harbors a dangerous animal or one who has habit of firing guns in the back yard. *Id.* at 880 n.5.

160. In some jurisdictions, liability will not be imposed in the absence of an identifiable, specific victim; no duty is owed to the public at large. See *Sterling v. Bloom*, 111 Idaho 211, 225, 723 P.2d 755, 769 (1986), *superseded by statute*, IDAHO CODE ANN. § 6-904A (2004), *as recognized in* *Harris v. State Dep't of Health & Welfare*, 123 Idaho 295, 301, 847 P.2d 1156, 1162 (1992).

161. *Id.* at 232, 723 P.2d at 776 (holding that the State can be held liable for a parole officer's negligent supervision of a parolee).

162. *Id.*

aggressive; broke curfew; and committed burglary, shoplifting, and injury to property, the youth ranch was deemed not to have been able to foresee that the inmate, once released, would commit murder.¹⁶³

These threads of common law are picked up in title 6, section 1607 of the Idaho Code, which greatly limits duties owed after the employer/employee relationship is over.¹⁶⁴ Post termination, the employer's control is virtually nil.¹⁶⁵ Similarly, the legislation limits employer liability when current employees commit bad acts off the clock or off the employer's premises, or, as the statute expressly states, unless not "otherwise under the direction or control of the employer."¹⁶⁶

4. Negligent Hire and Supervision

In the employment context, a similar duty to control arises at the time of hire. Professor Dobbs writes,

[E]mployers must exercise reasonable care to "control" their employees, which often translates to a duty to use care in hiring, supervising, or retaining a dangerous person whose position in employment puts him in a position to harm others, even if in harming others he is not acting within the scope of employment.¹⁶⁷

While these duties arise out of the duty to control, they become separate torts based on the employer's negligent action. Failure to use due care in hiring creates a dangerous situation, just as an extended jackarm on a moving train created a hazard in *Keim v. Gilmore & Pittsburg R.R.*¹⁶⁸ The more obvious the potential for harm the more clearly dangerous the situation is, and the more obvious the duty. The jackarm was dangerous because it extended, uncustomarily, beyond

163. *Caldwell v. Idaho Youth Ranch, Inc.*, 132 Idaho 120, 121, 125, 968 P.2d 215, 216, 220 (1998) (holding that no material issue of fact existed on this point). A similar foreseeability question arose in *Hunter*, where the possibility that Hood would statutorily or forcibly rape was fairly high, but the chance of murder seems small, even in retrospect. *Hunter v. State Dep't of Corr.*, 138 Idaho 44, 49–50, 57 P.3d 755, 760–61 (2002); see *supra* Part II.B.

164. See IDAHO CODE ANN. § 6-1607 (2004).

165. *Id.* § 6-1607(1). The employer may still hold the leverage of supplying a damning reference.

166. *Id.* § 6-1607(2) (emphasis added).

167. DOBBS, *supra* note 159, § 331, at 895–96.

168. 23 Idaho 511, 518–19, 131 P. 656, 658–59 (1913).

the expected distance.¹⁶⁹ The hiring of a plumber without checking his credentials is a hazard because of the extreme vulnerability of the homeowner. If instead of hiring a plumber one were hiring a pizza deliverer, the vulnerability—and hence the danger—would be lower although not non-existent. Elsewhere on the continuum would fall the hiring, training, and supervision of a school teacher, a known sex offender, and a respiratory therapist.¹⁷⁰

Extremely important in determining a duty is the employer's knowledge of the dangerous propensities of the employee. The *Restatement (Second) of Torts* states that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."¹⁷¹

The negligent supervision tort in Idaho is discussed cogently in *Rausch v. Pocatello Lumber Co.*¹⁷² The rule is generally stated that "[a]n employer's duty of care requires that an employer who knows of an employee's dangerous propensities control the employee so he or she will not injure third parties."¹⁷³ This does not involve "imputed or vicarious liability," like respondeat superior, but rather an allegation of the employer's own negligence.¹⁷⁴ Also, "negligent supervision liability encompasses conduct of the employee that is *outside* the scope of employment, at least if the employee is on the employer's premises or using an instrument or property of the employer."¹⁷⁵

The negligent supervision cause of action turns on the employer's knowledge of the employee's propensity to bad action.¹⁷⁶ In *Rausch*, the question was whether the employer knew of the employee's tendency toward "rough and dangerous horseplay."¹⁷⁷ This was a question of fact for the jury going to breach of duty.¹⁷⁸ In *Podolan*, the employer

169. *Id.* at 518, 131 P. at 658.

170. See *Hei v. Holzer*, 139 Idaho 81, 73 P.3d 94 (2003); *Hunter v. State Dep't of Corr.*, 138 Idaho 44, 48, 57 P.3d 755, 759 (2002); *Doe v. Garcia*, 131 Idaho 578, 580, 961 P.2d 1181, 1183 (1998), *abrogated by Hunter*, 138 Idaho 44, 57 P.3d 755; *Doe v. Durtschi*, 110 Idaho 466, 469, 716 P.2d 1238, 1241 (1986). There was no allegation of negligent hire in *Hei*, but that allegation was expressed in *Garcia* and *Durtschi* and implicit, at least to some degree, in *Hunter*.

171. RESTATEMENT (SECOND) OF TORTS § 319 (1965).

172. 135 Idaho 80, 14 P.3d 1074 (Ct. App. 2000).

173. *Id.* at 86, 14 P.3d at 1080.

174. *Id.*

175. *Id.*; cf. *Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 945, 854 P.2d 280, 288 (Ct. App. 1993) (finding that a person acts outside the scope of employment when "acting with purely personal motives").

176. *Rausch*, 135 Idaho at 86, 14 P.3d at 1080.

177. *Id.*

178. *Id.*

was not aware that the masquerading lawyer was doing work for the Podolans, nor did the Podolans produce evidence of whether Legal Aid knew or should have known of the attorney's involvement with them.¹⁷⁹ This, coupled with the employer's lack of knowledge of the attorney's past bad behavior, precluded liability for negligent supervision in that case.¹⁸⁰

C. The Duty to Protect

1. Classic Relationships

At common law, classic relationships giving rise to a duty to protect include parent and child, custodian and ward (including prisoner and jailor), guest and innkeeper, passenger and carrier, school and pupil—"and the list is not closed."¹⁸¹

In line with these relationships is the duty a hospital owes to its patients for happenings under its control.¹⁸² The scope of this duty requires the hospital to take reasonable steps to prevent patients from coming to harm, not only from medical malpractice or common negli-

179. *Podolan*, 123 Idaho at 946, 854 P.2d at 289. The negligent supervision portion of that opinion was affected by *Idaho Rule of Professional Conduct* 5.1(c) which states that

[a] lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct; or

(2) the lawyer is a partner . . . in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Idaho Rules of Prof'l Conduct R. 5.1(c) (2006).

180. *Id.*

181. DOBBS, *supra* note 159, at 875-76; *see also* PROSSER AND KEETON ON TORTS, *supra* note 152, at 376-77; RESTATEMENT (SECOND) OF TORTS § 316 (1965).

182. *Butler v. Caldwell Mem'l Hosp.*, 90 Idaho 434, 439, 412 P.2d 593, 595 (1966) ("The generally accepted requirement is that a private hospital conducted for gain must, in the care of its patients, exercise such reasonable care and attention for their safety as their mental and physical condition, if known, may require.") (quoting *Hayhurst v. Boyd Hosp.*, 43 Idaho 661, 669, 254 P. 528, 529 (1927)). Also, "[a]lthough a private hospital is not an insurer of a patient's safety, it must exercise such reasonable care toward a patient as his known condition may require." *Id.* (citation omitted); *see also* *Henderson v. Twin Falls County*, 59 Idaho 97, 99-100, 107, 80 P.2d 801, 802, 805 (1938) (affirming a hospital's liability for a special nurse's administration of boric acid solution instead of saline solution).

gence,¹⁸³ but also from third parties, including criminal third parties.¹⁸⁴ This duty arises not only because a hospital usually owns the premises, but also because of the special vulnerability of the patient.¹⁸⁵

Another protective relationship is that of employer and employee. This duty has most recently been articulated as “a duty [of employers] to exercise reasonable care commensurate with the nature of their business in order to protect [an employee] from hazards incident to the employment and to provide him with safe tools, appliances, machinery, and working places.”¹⁸⁶ That duty incorporates liability for nonfeasance as well as misfeasance.¹⁸⁷ Nearly all liability for violation of that duty is within the exclusivity of Workers’ Compensation.¹⁸⁸

Under classic protective duty analysis, each of the defendants in our three cases owed the plaintiffs (or plaintiffs’ decedents) a duty of protection. Doe was a patient at the hospital.¹⁸⁹ Had Garcia stolen money from his closet or molested him on the premises, the hospital’s liability would not be in serious question. Hunter was an employee of

183. In *Corey v. Beck*, 58 Idaho 281, 288, 72 P.2d 856, 859 (1937), plaintiff stated a valid cause of action against the hospital for burns sustained when hot water bottles were negligently administered.

184. See generally 40A AM. JUR. 2D *Hospitals and Asylums* § 37 (1999). *American Law Reports* notes several theories of recovery that have succeeded nationwide, sounding in tort and contract, when healers have sexually assaulted their patients. Russell G. Donaldson, Annotation, *Liability of Hospital or Clinic for Sexual Relationships with Patients by Staff Physicians, Psychologists, and Other Healers*, 45 A.L.R. 4TH 289 (1986). These are not normally considered medical malpractice claims, so plaintiffs are not required to go through medical malpractice screening procedures like those found at IDAHO CODE ANN. §§ 6-1001 to -1013 (2004). Cf. *Murphy v. Mortell*, 684 N.E.2d 1185, 1188 (Ind. Ct. App. 1997) (finding that an allegation of coerced sexual intercourse “did not constitute a rendition of health care or professional services”).

185. A Louisiana appellate court addressed the helpless confinement of a sixteen year old in a locked psychiatric facility in *Samuels v. Southern Baptist Hospital*, 594 So. 2d 571, 574 (La. Ct. App. 1992). The hospital was held vicariously liable for a sexual assault by a nighttime assistant despite a finding that the hospital was not negligent in its hiring or supervision practices. *Id.*

186. *West v. Sonke*, 132 Idaho 133, 142, 968 P.2d 228, 237 (1998). Usually a worker’s tort claim against an employer is preempted by workers’ compensation. See IDAHO CODE ANN. §§ 72-201 to -230 (2006); see generally RESTATEMENT (SECOND) OF TORTS § 314B (1965).

187. “In order to show that the [employer] breached a duty [plaintiff employee’s representative] must provide evidence that [employer] acted inappropriately or inappropriately failed to act.” *West*, 132 Idaho at 143, 968 P.2d at 238. In that case, summary judgment for employers was upheld over a dissent from Justice Walters. *Id.*

188. See §§ 72-201 to -230.

189. *Doe v. Garcia*, 131 Idaho 578, 579, 961 P.2d 1181, 1182 (1998), *abrogated by* *Hunter v. State Dep’t of Corr.*, 138 Idaho 44, 57 P.3d 755 (2002).

Mr. Wash.¹⁹⁰ Had she been exposed to toxic fumes during her job at Mr. Wash, Mr. Wash could have been liable even if the symptoms had not manifested themselves until later. Hei was a pupil in the school.¹⁹¹ Under common law, Hei would have been owed a duty of protection from the school. In her case, she was unsuccessful in establishing that the school owed her a duty of careful supervision to protect her from Holzer because of the intricacies of title 6, section 904A of the Idaho Code.¹⁹²

2. Statutory Duty Owed to Plaintiff

The basic rule of respondeat superior notwithstanding, there are some cases in which an employer is liable for an employee's torts even though the employee was clearly not acting within the scope of employment. One category of these cases can be defined as the statutory duty cases: when a statute directs the employer to ensure the safety of a certain class of people, the employer may be liable when a member of the class is injured. One of the most graphic examples is *Doe v. Durtschi*.¹⁹³ A public school teacher molested some of his fourth grade female students "during school hours and while conducting or supervising school activities."¹⁹⁴ The court found that "[p]ursuant to [Idaho Code section] 33-512(4), school districts in the state of Idaho are under a statutory duty to protect the morals and health of their students."¹⁹⁵ In *Durtschi*, the school district could be liable for negligent supervision, retention, and transfer of a child molester.¹⁹⁶ Similarly, in *Hei* "[t]he school district owed some type of duty of care to Hei."¹⁹⁷ This was one of her few successful claims.¹⁹⁸

190. *Hunter*, 138 Idaho at 46, 57 P.3d at 757.

191. *Hei v. Holzer*, 139 Idaho 81, 84, 73 P.3d 94, 97 (2003).

192. *Id.* at 87-88, 73 P.3d at 100-01; *see supra* notes 86-95 and accompanying text.

193. 110 Idaho 466, 716 P.2d 1238 (1986).

194. *Id.* at 468-69, 716 P.2d at 1240-41.

195. *Id.* at 471, 716 P.2d at 1243.

196. *Id.* at 471-73, 716 P.2d at 1243-45. The *Durtschi* court had to separate out the school district's statutory obligation to indemnify Durtschi for his defense (non-existent because his behavior was intentional, criminal, and outside the scope of his employment), the school district's liability for the battery of child molestation (non-existent because the Idaho Torts Claims Act did not waive governmental immunity for claims arising out of an assault or battery), and the school district's liability for its own acts of retaining and transferring Durtschi from school to school (no immunity, so summary judgment reversed). *Id.* at 470-73, 716 P.2d at 1242-45.

197. 139 Idaho at 88, 73 P.3d at 101 (citing IDAHO CODE ANN. § 33-512 (2006)).

198. *Id.* at 88-89, 73 P.3d at 100-01.

When the employer has its own duty running to the plaintiff, the liability need not be predicated on respondeat superior, and "scope of employment" and "authority" questions are irrelevant. *Hei* demonstrates this point a second time, as *Hei* was also successful at withstanding summary judgment on her Title IX claim,¹⁹⁹ a claim predicated on the school district's indifference to her right.²⁰⁰

3. Contractual Obligations

The plaintiff's contractual relationship with the employer may render the employer liable under contract law for the torts of its employees. For example, in *George v. University of Idaho*, the existence of a sexual harassment policy in the University's Faculty-Staff Handbook gave rise to a claim of breach of implied contractual duty to provide relief to sexual harassment victims.²⁰¹

D. The Coexistence of the Duty to Control and the Duty to Protect

Oftentimes the duty to control and the duty to protect are intertwined and an attempt to separate them involves undue hairsplitting. In the well-known and seminal California case of *Tarasoff v. Regents of the University of California*, a psychotherapist, Dr. Moore, was aware that his patient, Poddar, had the intention to kill Tatiana Tarasoff.²⁰² Sadly, Poddar was successful in killing Tatiana.²⁰³ The California Supreme Court allowed her parents to withstand demurrer against Dr. Moore and his employer, the University of California, because Dr. Moore's relationship with Poddar created a duty to one foreseeably harmed by Poddar, namely Tatiana.²⁰⁴ This is primarily a failure to *control* case, because the source of the duty is Dr. Moore's pre-existing relationship with Poddar. But in finding the duty the court noted the fact that the victim was specifically identifiable.²⁰⁵ The breach analysis likely turned on whether or not Dr. Moore should have warned Tatiana, rather than whether he should have taken

199. 20 U.S.C. § 1681 (2000).

200. *Hei*, 139 Idaho at 87, 73 P.3d at 100.

201. 121 Idaho 30, 38, 822 P.2d 549, 557 (Ct. App. 1991). Breach of express contract was also at issue in this reversal of summary judgment. *Id.* at 36-37, 822 P.2d at 555-56.

202. 551 P.2d 334, 341 (Cal. 1976).

203. *Id.*

204. *Id.* at 342-43. That opinion limits the situations in which that duty arises and limits the scope of that duty. *See id.*

205. *Id.* at 346.

more steps to have Poddar locked up.²⁰⁶ And, in common parlance, we say that Dr. Moore “should have protected Tatiana.”

Most interesting are the cases where both a duty to control and a duty to protect exist, which is true in *Garcia*, *Hunter*, and *Hei*. The plaintiff in *Garcia* was a patient at the hospital²⁰⁷ and Hunter was an employee of Mr. Wash,²⁰⁸ so their claims against their attacker’s employer could have been based on their primary relationships with the defendants. The fact that a long time elapsed after the end of their relationships with the defendant worked against them, and their cases were based largely on the relationship between their attackers and the attackers’ employers. *Hei*’s case involves two clear relationships, each on-going at the time of the sexual affair with the teacher: she was a student at the high school, and the teacher was an employee.²⁰⁹ It was her status as a student that proved to create her most legally successful relationship and formed the basis of her most successful claims.²¹⁰ Analytically, these three cases involve both the failure to *control* and to *protect*; this dual set of obligations is most vivid in *Hei*.

E. Public Policy

Because the tort analysis begins with duty, it is often the first target for summary judgment motions by defendants.²¹¹ If the matter is resolved in the defendant’s favor, the defendant is pleased to end the lawsuit before significant legal fees have accrued. Others situated similarly to defendant—potential defendants in other cases—also feel some relief. The judge decides the duty question as a matter of law, which becomes precedent. As the law becomes settled in a fashion that exonerates defendants, the chances of being sued are reduced. Insurance costs should reflect the “protection” and be lower than if a

206. *See id.* at 345–46.

207. *Doe v. Garcia*, 131 Idaho 578, 579, 961 P.2d 1181, 1182 (1998), *abrogated by* *Hunter v. State Dep’t of Corr.*, 138 Idaho 44, 57 P.3d 755 (2002).

208. *Hunter*, 138 Idaho at 46, 57 P.3d at 757.

209. *Hei v. Holzer*, 139 Idaho 81, 84, 73 P.3d 94, 97 (2003).

210. *See id.* at 88, 73 P.3d at 101.

211. Duty questions can normally be resolved on motions to dismiss or summary judgment even though some factual questions are involved, because the essential question is whether the law suit should even continue. Breach and causation questions should be submitted to a jury unless reasonable minds could not differ. *See, e.g.*, *S. H. Kress & Co. v. Godman*, 95 Idaho 614, 615, 515 P.2d 561, 562 (1973). Judges are usually viewed as more sympathetic to defendants, although a recent study calls this into question in Idaho. *See, e.g.*, JOHN A. FIEDLER ET AL., *JURY AWARDS IN IDAHO: A SURVEY STUDY OF PUNITIVE AND NON-ECONOMIC DAMAGE AWARDS IN IDAHO COURTS* (2003) (on file with author).

duty were found.²¹² Potential defendants should lose less sleep worrying about the emotional and financial costs of this type of litigation.

Yet causing worry to potential defendants is one of the goals of tort law, although it is usually phrased as the desire to deter negligent behavior by this defendant and others similarly situated. Those others similarly situated includes those in the same insurance pool as the defendants at bar. Insofar as insurance rates reflect the tort claims made and won against similarly-situated insureds, class members are not necessarily their brothers' keepers but certainly their brothers' subsidizers.

One of the reasons for a precedential judicial system is that news of the decision will get out and prompt liability concerns, which in turn will prompt a review of behaviors. On the other hand, we want to constrain or direct the behavior of the defendant and his compatriots only up to a point, a point often defined by the elusive term "reasonableness." We do not want defendants to be so cautious that they are paralyzed, nor do we want to place too heavy a burden on various constituencies in society. These constituencies include potential defendant employers, current and potential employees, and defendants' customers.

Returning to a point made earlier in this article, the actual perpetrator of the crime, intentional tort, or bad act is the person primarily to be deterred. Criminal laws, tort rules, and social and moral pressures are, and should be, placed on the perpetrators. But *Garcia*, *Hunter*, and *Hei* involve situations where legal and personal disincentives have been ignored by the perpetrator and have failed as a deterrent.²¹³ Plaintiffs' outcomes in these cases would, theoretically, deter the employer from engaging in some act or omission but for which the problem would not have occurred. This pressure from tort law may not be necessary. Employers are already deterred from having their employees commit unfortunate acts by a variety of forces, not the least of which are natural human empathy for the victims and aversion to scandal and negative publicity. Yet again, in these three cases, these nonlegal incentives have proven ineffective in affecting allegedly negligent employer behavior.

A finding of tort liability adds a direct financial impetus to changing behavior. The financial ramifications of tort liability, along with a natural desire to avoid the lost time and personal discomfort of

212. This assumes that insurance rates fluctuate according to tort claims as opposed to other reasons.

213. A question far beyond the scope of this article is whether some of the bad actors described in these situations were compelled to act by virtue of "sexual addiction" or psychological abnormality, as opposed to choosing to act by means of rational thought processes.

being sued, should lead those who consider themselves to be potential future defendants (Idaho employers) to behave differently in an attempt to avoid lawsuits. The worst case scenario is that the burden of potential lawsuits will be too high and the cost of goods or services will rise. These arguments are often made, and are somewhat true, when tort law is expanded; the countervailing consideration is the social need to prevent the type of harm suffered by these plaintiffs.

Also troubling is the prospect that the privacy of job applicants will be invaded and that wide swaths of the population will become unemployable because of errors in their pasts. Anyone with a criminal record, especially a record of a sexual or financial impropriety, may find it even more difficult to get a job. Employers, like most potential defendants, are cautious and tend to overprotect themselves.²¹⁴

The reaction to *Garcia's* finding of duty was instantaneous and loud. Clamors of dismay came from employers, frightened by their perception of potentially "limitless" liability for bad acts committed by countless former employees.²¹⁵ Critics pointed to the minimal basis for a finding of negligence, the lack of specific foreseeability running to the plaintiff, and the causal, geographical, and temporal remoteness between the hospital and the crimes.²¹⁶ Doe was a *former* patient, Garcia was a *former* employee, and the acts were carried out off company premises, nearly a month after Garcia was fired.²¹⁷ The defense bar, like the district court and the dissent, were quick to see the ramifications beyond hospitals and patients to businesses and employers throughout the state.

214. See generally Kingsley R. Browne, *The Silenced Workplace: Employer Censorship under Title VII*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 399 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995).

215. Holland & Hart, LLP, *New Law Limits Your Liability for Crimes Committed by Off-Duty or Former Employees*, 5 No. 3 IDAHO EMP. L. LETTER 3, June 2000, noted the shock felt by private and public employers alike, and referred to *Garcia* as a "nightmare ruling."

216. Many of these objections go more to proximate cause than to duty. The district court specifically found that "[a]t no time during the continuation of this molestation was there any connection between Garcia and the hospital or between John Doe and the hospital." *Doe v. Garcia*, 131 Idaho 578, 583, 961 P.2d 1181, 1186 (1998) (Schroeder, J., dissenting), *abrogated by* *Hunter v. State Dep't of Corr.*, 138 Idaho 44, 57 P.3d 577 (2002). *Contra id.* at 587 n.1, 961 P.2d at 1190 n.1 ("Doe testified that Garcia once told him that while Doe was in the hospital, Garcia had offered oral sex. Doe said this conversation happened about two years after he was in the hospital. However, Doe has no recollection of the event itself, and Garcia denied it ever actually happened.").

217. *Id.* at 583, 961 P.2d at 1186.

Employers read *Garcia* broadly and considered themselves to be put on notice to be careful in hiring—to check references, perhaps to check for criminal records, and to conduct thorough interviews.²¹⁸ Employers already had business incentives to hire people good at performing tasks required at the job. *Garcia* encouraged employers to also look at the criminal propensities of their prospective hires.²¹⁹ Hiring is the best time to vet employees. Once they are hired any attempt at termination may be countered with threats to sue, the at-will rule notwithstanding. Considerable harm might be deterred with more careful hiring. On the other hand, considerable over-deterrence might occur. Small, irrelevant, or dated crime records might render many applicants virtually unemployable. This, in turn, might have more impacts on certain races and national origins than others. Another over-deterrence scenario is that employers may put themselves on a hair trigger for firing employees at the slightest indication of an unfortunate propensity. This over-deterrence could lead to increased unemployment, the loss of good workers, invasion of the privacy of applicants and employees, and more wrongful termination law suits.

These fears are real but can be tempered by the recollection that our negligence system requires not perfection but reasonableness.²²⁰ The standard is set to a large degree by expectation and custom. Standard good practice is that more sensitive jobs, involving more vulnerable patrons, call for more intrusive background searches of

218. See Paul R. Winward, Note, *The Need for Change in Idaho's Reference Immunity Statute: A Proposal to Minimize Idaho Employers' Exposure to Negligent Hiring Claims After Doe v. Garcia*, 35 IDAHO L. REV. 343 (1999).

219. If allowed to stand, the jury decision in favor of Hunter could have deterred both the State and employers from hiring probationers, parolees, or anyone with a criminal conviction. This would have been a blow to reintegration programs, especially reintegration of people convicted of crimes perceived to have high recidivism rates. The court did not mention the social utility of employment of convicts.

The point was not lost on the plaintiffs, Hunter's parents, but their argument swung the other way, favoring public safety over the reintegration of sex offenders into society. After their loss at the high court, they shifted their attention to the legislative branch, campaigning for "Wendy's Law," right-to-know legislation requiring employers employing sex offenders to notify the parents of minor employees. That legislation died in committee. Dale & Hollister, *supra* note 57, at 2.

220. Defense-oriented readers may be snorting at this; mistrust of juries is reflexive among business people. See, e.g., Dale & Hollister, *supra* note 57 (praising *Hunter* for its "sharp rebuke" to the jury). However, jurors' glee at fishing into the deep pocketed defendant has been exaggerated. For a careful and subtle examination of jurors' responses to business litigants, see VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000). In Idaho a 2002 survey of state judges revealed that "punitive and large non-economic damage awards are very rare in Idaho courtrooms," and that "Idaho judges do not perceive any problems with Idaho juries being overly generous to claimants." FIEDLER ET AL., *supra* note 211, at *1.

prospective employees and greater supervision of existing employees.²²¹ That standard need not change.

The higher the standard for careful hiring, the more necessary it is for a prospective employer to get honest references. And yet, the more crucial references become to hiring, the higher the damage caused by an inaccurate reference. From the point of view of the person giving the reference, the greater liability comes with no direct reward.²²² The Idaho legislature has sought to protect reference givers;²²³ but this conundrum could be addressed by additional privileges and immunities for those providing references, so that they would be more forthcoming.²²⁴

Fearing potential lawsuits is as heavy a cost of doing business as defending lawsuits.²²⁵ Employers would be delighted to lob off one swath of potentially fertile claims, which is accomplished to a large extent by the passage of title 6, section 1607 of the Idaho Code. But even so, employers have not been, and should not be, permitted the luxury of a complete no-duty rule.

221. See, e.g., Brian L. Lerner, *Ten Tips from the Front Lines: Practical Guidance for Avoiding Employment Lawsuits*, 12 No. 4 H. R. ADVISOR: LEGAL & PRACTICAL GUIDANCE 4, July / Aug. 2006.

222. STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 361 (2nd ed. 1998).

223. IDAHO CODE ANN. § 44-201 (2003).

224. Winward, *supra* note 218, at 345. This article suggests changes to title 44, section 201 of the Idaho Code, the references immunity statute, and suggests steps employers could take to safeguard workers' privacy. *Id.*

225. Stephen C. Dillard, *Litigation Nation*, THE WALL STREET JOURNAL, Nov. 25, 2006, at A9, asserts that lawsuits from current employees are a top concern for many businesses.

So, what is tops on the corporate lawyer worry-list? Securities related cases may grab the headlines, but more than half of the in-house counsel cited employment as their top litigation concern. The workplace has become a legal minefield Disgruntled workers are a fact of life, with aggrieved employees quicker to sue than almost any other group

Id. The flip side of worries over suits like those brought by Doe, Hunter, and Hei are ones brought by workers hastily discharged out of fear of continuing employment with a Garcia, a Hood, or even a Holzer.

F. Statutory Constriction of the Scope of Duty

With the express intention of protecting employers,²²⁶ the Idaho Legislature passed title 6, section 1607 of the Idaho Code in 2000, after two years of lobbying by the Idaho Chamber of Commerce.²²⁷ Subsection 1 addresses former employees, and subsection 2 addresses “off the clock” employees.²²⁸ Both subsections preclude employer liability for acts or omissions of the employee absent clear and convincing evidence of the employer’s gross negligence, recklessness, or willful and wanton conduct.²²⁹ Subsection 2 purports to create “a presumption

226. H.B. 543, 55th Leg., 2nd Sess. § 1 (Idaho 2000). Even without the legislative action, the scope of the duty could have been limited. For example, the *Restatement (Second) of Torts* limits employer liability for intentional acts by employees outside the scope of employment to situations where the servant is on the employer’s premises, on premises on which he is privileged to enter by virtue of employment, or is using a chattel of the employer. RESTATEMENT (SECOND) OF TORTS § 317 (1965). The *Restatement* states:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

- (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
- (ii) is using a chattel of the master, and

(b) the master

- (i) knows or has reason to know that he has the ability to control his servant, and
- (ii) knows or should know of the necessity and opportunity for exercising such control.

Id. The *Restatement* rule covers the plumber example used in this article, as the plumber would be on the premises by virtue of the privilege of his employment. See *supra* Part I.

Some room for argument might still be open to plaintiffs’ lawyers, but ultimately defendants would probably prevail under the *Restatement* premises limitation. For example, if the bad acts in the cases are identified as sexual touchings (*Doe* and *Hei*) and murder (*Hunter*), then apparently none of them occurred on the employer’s premises. (The locale of *Hei* and *Holzer*’s liaisons is not disclosed in the opinions.) But the thrust of plaintiffs’ arguments in all three cases is that the flirtation, seduction, or grooming of the victims began when the bad actor was an employee, in areas under the employer’s control. The complication is that flirtation and friendship, even between minors and adults, are not actionable behaviors. The *actionable* harm apparently took place off premises. So the *Restatement*’s common law limit on duty, had it been adopted in Idaho, would have prevented our three cases from moving forward even absent any legislation.

227. IDAHO CODE ANN. § 6-1607 (2004); Holland & Hart, *supra* note 215; see also Liz Wyatt, *Debate Continues on Employer Liability Bill: Legislation Would Shield Companies from Off-Hours Acts*, IDAHO STATESMAN, Feb. 13, 1999, at 4B; Thomas Clouse, *Panel Gets Bill to Limit Employers’ Liability*, IDAHO STATESMAN, Mar. 16, 1999, at 1B.

228. § 6-1607(1)-(2).

229. *Id.*

that an employer is not liable in tort,"²³⁰ an odd phrase as plaintiffs generally bear the burden of proof. With the standard of proof raised to "clear and convincing evidence" and the standard of care lowered to gross negligence, recklessness, or willful and wanton conduct, the "presumption" seems to be unnecessary verbiage. The intent was doubtless to convey the extreme distaste of the legislature for liability in any but cases of extreme employer malfeasance. Subsection 2 does contain considerable, yet appropriate, exceptions.²³¹

The statute shields employers to an astonishing degree in subsection 3. That section allows an employer, after discovery and upon motion, a "right . . . to a hearing . . . in which the person asserting a claim against an employer must establish a reasonable likelihood of proving facts at trial sufficient to support a finding that liability for damages should be apportioned to the employer."²³² This constitutes a right to a summary judgement motion with a twist—the burden will be on the non-moving plaintiff to establish not only that reasonable minds could differ but also that she or he has a "reasonable likelihood" of prevailing at trial. This is the opposite of the standard burden of proof on the moving party to demonstrate that facts are either undisputed²³³ or that no claim has been stated.²³⁴ The standard is lower for employers than if they moved for summary judgement. In a summary judgement motion, defendants have to prove that material facts are not in dispute. Here the moving defendants can make the plaintiffs prove that they have a reasonable likelihood of winning. In a proceeding akin to a probable cause hearing, the judge will be able to take away from the fact finder the ability to make factual determinations and credibility assessments. This provides Idaho's employers with more protection than is afforded to Idaho doctors and medical providers, although they are deemed to be in such sufficiently endangered supply as to be worthy of special procedures.²³⁵ The employer protection in subsection 3 might or might not pass constitutional mus-

230. § 6-1607(2).

231. *Id.*

232. § 6-1607(3).

233. IDAHO R. CIV. P. 56(c); *see also* CRAIG LEWIS, IDAHO PRE-TRIAL CIVIL PROCEDURE VII-21 (1982).

234. IDAHO R. CIV. P. 12(b)(6); *see also* LEWIS, *supra* note 233, at VII-10 to -11.

235. *See* IDAHO CODE ANN. § 6-1001 (2004); H.B. 489, 43d Leg., 1st Sess. § 1 (Idaho 1976) (codified at § 6-1001).

ter,²³⁶ but creates a significant deviation from standard Idaho trial practice.²³⁷

The exceptions to limited liability, listed in subsection 2, are well conceived, including situations where the employee was or appeared to be engaged in the employer's business or under the employer's direction and control—classic respondeat superior and apparent authority liability.²³⁸ There was room for the legislature to include the same exceptions for former employees as well. Consider again the rogue plumber. He is fired but is allowed to keep his uniform, which he then uses to obtain access to a victim's house. It may be negligent of the employer not to recover the uniform before allowing the employee to leave employment on general principles, but not necessarily in the case of a voluntary and amicable departure. Few would argue it was grossly negligent without more facts. Yet the uniform, or even just the prior connection to a legitimate concern, may provide the entrée needed to a villain. This is one aspect of *Doe v. Garcia*. If an employer had knowledge of an employee's criminal proclivities, terminated him, but allowed him to keep a badge or a uniform, that might well constitute gross negligence. Suppose, for example, an employer hires, but makes no attempt to check the background of, a thief for the position of bank clerk or telephone order-taker. The thief thereby gets access to financial information, which he uses to steal after he has been discharged. If a simple background check would have revealed the propensity to steal, the victim should be allowed to take the breach question to the jury.

Some employer liability remains after the passage of the statute.²³⁹ Obviously, an employer may still be vicariously liable for an

236. See *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 717, 791 P.2d 1285, 1296 (1990) (holding "that the legislature clearly has the power to abolish or modify common law [causes of action]").

237. This paragraph was greatly informed by discussion with Professor Alan Williams of the University of Idaho College of Law.

238. Thus the cases against the masquerading attorney in *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 854 P.2d 280 (Ct. App. 1993), and the well-intentioned plumber in *Wooley Trust v. DeBest Plumbing Inc.*, 133 Idaho 180, 983 P.2d 834 (1999), would probably not be excluded by this legislation.

239. James Dale had the following comments about the legislation after *Hei*:

While no Idaho appellate court has yet had the chance to fully examine the workings of the state statute that purports to limit employer liability for the acts of former employees or those persons acting outside the course and scope of their employment, the fact remains that not all duties are eliminated. The *Hei* case doesn't change that result, but it does afford all of this state's employers an opportunity to read the court's temperature on matters of that kind. Because cases that reach the court involving a duty-to-control issue usually involve rather disturbing facts, it's important to recognize that the courts aren't inclined to cut employers any breaks. Put another way, the

employee's negligent performance of duty as well as liable for its own negligent hiring, training, or supervision. They may also be liable when, as the legislation expressly states, the employee is using the job itself or the appearance of the job to further the bad behavior, and is "wholly or partially engaged in the employer's business."²⁴⁰ The intent of this legislation is clear, but questions might arise about how broadly to read this clause. For example, when did Holzer's "flirting" move from friendly student relations to his own personal frolic? When did the chair-removing prankster in *Rausch* cease to be doing the employer's work?

A remaining question is whether the employer remains liable for creating a dangerous situation²⁴¹ which comes to its climax, thereby causing injury, after termination of the employee. The statutory language probably precludes liability, especially given the stated intent of the legislature to protect employers, because it states that "[n]o employer shall be directly or indirectly liable in tort based upon an employer/employee relationship."²⁴² If the creation of the dangerous situation is the hire or supervision of the employee, that means the dangerous situation is the creation of the employment relationship. The statute expressly disavows liability "based upon" the relationship. But, according to the Idaho Statesman, when this matter was being debated, "Idaho Trial Lawyers Association President Steven Andersen said that day-care centers would be able to hire child molesters without any liability."²⁴³ Pat Olsson, described as "an attorney who helped draft the bill," replied, "That is simply fallacious."²⁴⁴ This puffing from both sides should perhaps be put aside. But Steven Andersen's point is right at the heart of the legislation. Suppose a day care hires a child molester. Failure to do a background check on a day care worker may well constitute gross negligence or recklessness. But assume the credentials were reasonably good at the time of hire, and the worker's proclivities come to light only later. The worker may be instantly fired. But, to avoid gross negligence and recklessness, the day care should probably notify all parents of currently and formerly

employer must live up to its duties. In the meantime, you must remain especially vigilant to look for signs of budding relationships or other inappropriate conduct that may expose your company to potential liability.

Dale, *supra* note 156.

240. § 6-1607(2).

241. RESTATEMENT (SECOND) OF TORTS § 321 (1965).

242. § 6-1607(1) (emphasis added).

243. Wyatt, *supra* note 227.

244. *Id.*

enrolled children who came into contact with the worker. Otherwise they might engage in the common practice of hiring this person—one they knew and trusted—as a home babysitter, or otherwise maintaining contact. The day care center will not be eager to broadcast the unsuitability of this worker for fear of losing business or being sued by the worker for calumnious defamation, but public safety may well tip in favor of disclosure and warning to the parents.

IV. CURRENT STATE OF THE LAW

Title 6, section 1607 of the Idaho Code was not argued or discussed in any of our three cases, but would clearly affect them had they been brought after 1999. In this section I will discuss what remains of the cases after section 6-1607, with an eye to testing the limits of liability for Idaho employers. Certainly duties remain requiring employers to be careful in the hire, supervision, training, and control of workers.

A. *Doe v. Garcia*

This case would probably be dismissed after passage of the statute, but is still instructive to employers on how to conduct their employment practices.²⁴⁵ If Doe's molestation had taken place at the hospital or pursuant to Garcia's duties (for example, on a home visit performing outpatient services), the negligent hire and supervision claims would still have been viable. It remains worthwhile to consider the sharply divided attitudes of the judges in this case.

1. Negligent Hire

Plaintiffs alleged that the hospital should have paid more attention to the DUI conviction on his job application,²⁴⁶ and, more impor-

245. 131 Idaho 578, 961 P.2d 1181 (1998), *abrogated by* Hunter v. State Dep't of Corr., 138 Idaho 44, 57 P.3d 755 (2002). *Garcia* was discussed during deliberations on the legislation. Clouse, *supra* note 227. Nonetheless, an argument remains that the suit was not for an act or omission of an employee occurring after the employee's termination, but rather was for the act or omission of the employer before the employee's hire. Put another way, the suit could be characterized as one where the employer created a dangerous situation. See RESTATEMENT SECOND § 321.

246. A matter not discussed by the courts or the parties was whether the notation of a DUI on an employment application should prompt closer scrutiny by the employer. For example, is it indicative of an alcohol problem? of a scoff-law attitude? of a propensity for reckless behavior? What further steps should be taken by an employer to assess the fitness of a job applicant with a DUI on the record? How dependent is that answer on the duties associated with the job applied for? If a DUI is considered to be evidence of dubious character, quite a few people will become unhirable. Idaho convicted 7,277 drivers for DUI in 2001. NATIONAL HARDCORE DRUNK DRIVER PROJECT, IDAHO STATE PROFILE 1,

tantly, should have contacted his former employer, St. Mary's Hospital, in Nevada. His personnel file at St. Mary's would have revealed that he was dismissed for sexual molestation of a patient.²⁴⁷ The court found that there existed a "genuine issue of material fact whether the hospital was negligent in hiring [Garcia]."²⁴⁸

The majority and the dissent were in thorough disagreement with each other on nearly every aspect of the case, even reading the record differently.²⁴⁹ *Garcia's* reversal of summary judgment, allowing plaintiff to proceed to trial on the negligent hire, is not particularly striking, nor is it surprising that the duty should be on behalf of a patient in the hospital. If the hospital had been careless as to *Garcia's* credentials as a respiratory therapist, and improper treatment had resulted, this case would be run of the mill. The type of harm—emotional and psychic, rather than physical—was somewhat unusual, but had physical harm occurred to a patient, parasitic emotional harm would have been a standard item of damage. The manner in which the emotional harm was inflicted—via sexual abuse—is unusual but not unheard of.²⁵⁰

The alternative to finding for plaintiff was for the court to determine either that this scenario was not within the scope of the duty of negligent hire cases or that, as a matter of law, there was no proximate cause. The case does not appear to have been argued in a fashion that would lead to such a result. Also, a finding that the scope of a hiring employer's duty did not extend to protecting patrons from sexual abuse seems unwise. Respiratory therapy in a hospital requires fairly close personal contact in a setting where the patient is scantily clad in a hospital gown, weak, and lying in a bed. Had the molestation occurred in the hospital room, this would be a different case, and it is

http://dwdidata.org/state_prof/idaho.html (last visited Mar. 27, 2007). Even to be hired as an Idaho State Police Officer, a DUI on one's record is acceptable if it occurred more than five years before the application. Idaho State Police Trooper Application Addendum, <http://www.isp.state.id.us/hr/TrooperAddendum.html#DrugPolicy> (last visited Mar. 27, 2007).

247. *Garcia*, 131 Idaho at 580, 961 P.2d at 1183.

248. *Id.* Also in *Garcia's* record was a California criminal conviction for sexual improprieties. This does not figure into the majority's decision. The dissent noted that "[t]he only evidence in the record is that this criminal conviction does not show up on Idaho law enforcement records, and would not have been revealed to the hospital even if an inquiry had been made." *Id.* at 584, 961 P.2d at 1187 (Schroeder, J., dissenting).

249. Compare the majority's assertions regarding St. Mary's procedures for release of information, *id.* at 580, 961 P.2d at 1183, with the dissent's assertions about what was in the record, *id.* at 582, 961 P.2d at 1185.

250. See Donaldson, *supra* note 184.

unlikely that the hospital would credibly be arguing that the protection of the patients from abuse was not within its scope of duty.

What is striking about the pro-plaintiff result in *Garcia* is the proximate cause problem. The harm occurred off-site many months after the employee was hired—eleven months after the patient was discharged and one month after the employee was terminated. Expressed in proximate cause terminology, the injury was remote and indirect, far removed from the allegedly negligent act of hiring. The manner in which the injury occurred—the grooming over a long time period—was possibly unforeseeable, although this begs the question: if the hospital had known more about the employee, would it have been able to foresee this type of long-term grooming and ultimate molestation? The court of appeal's decision addresses proximate cause at length.²⁵¹ Both appellate courts determined that proximate cause was a jury question,²⁵² decisions that were correct according to Idaho precedent and standard common law. It is this aspect of the decisions that title 6, section 1607 of the Idaho Code addresses. The statute settles the proximate cause question, keeping the question from the jury except in cases of gross employer negligence or worse.

The proximate harm issues—the remoteness of the harm from the time and place of the possible negligence of the hospital and the arguably unforeseeable set of events—are what make this case weird and unusual. But those are wrinkles or details. The essence of the Idaho Supreme Court's decision remains true: employers should be sensitive to the situations they create. Choosing to employ someone amounts to choosing to vouch for the person. The vivid truth of *Garcia* is that parents would not allow a stranger in the street to converse with or touch or befriend their thirteen-year-old son, but they would allow a hospital worker to do so. Both the *Garcia* and the *Sisters of Holy Cross* opinions require the hospital to be cognizant of its responsibility in fostering the relationship between the worker and the child.²⁵³

2. Negligent Supervision

This cause of action is similar to negligent hire, except that the allegedly negligent supervision covered a longer time period. The hospital's information about *Garcia* was expanded to include the inappropriate invitations to the young men on staff and, constructively,

251. *Doe v. Sisters of the Holy Cross*, 126 Idaho 1036, 1039–44, 895 P.2d 1229, 1232–37 (Ct. App. 1995).

252. *Id.* at 1041, 895 P.2d at 1234; *Garcia*, 131 Idaho at 588, 961 P.2d at 1191 (Schroeder, J., dissenting).

253. *See supra* notes 16–47 and accompanying text.

the revelations to the Employee Assistance Program (EAP) counselor. Given this knowledge, Garcia should arguably have been supervised differently or terminated. How this should have been handled is of continuing interest to Idaho employers.

Plaintiff argued that

the hospital, as a tertiary care provider in the community, should have been aware of the proclivity of pedophiles to recruit and groom potential victims over a period of time, and that the invitation to the two young men could have been construed as the first move in the grooming process of a pedophile.²⁵⁴

The district court cited evidence²⁵⁵ that the young men invited out by Garcia thought he was “weird and perhaps homosexual” but did not feel threatened.²⁵⁶ The district court had concluded that “[m]ere homosexuality . . . would not give rise to any suspicion of pedophilia,”²⁵⁷ and further observed that the young men were eighteen and nineteen, not children like Doe.²⁵⁸ It also saw no reports of overlooked complaints from anyone.²⁵⁹ On the other hand, most would agree²⁶⁰ that the more the hospital got evidence that this employee was sexually troubled, prone to inappropriate suggestions (like inviting the co-workers to drink illegally), and generally perceived as “weird,” the more it should have acted to terminate him.

Even so, many questions remain. Once Garcia and Doe had been introduced incident to Garcia’s employment, what could the hospital have done even if it had been fully on notice that Garcia was groom-

254. *Garcia*, 131 Idaho at 585, 961 P.2d at 1188. See another articulation of this argument in *Sisters of the Holy Cross*, 126 Idaho at 1043, 895 P.2d at 1236.

255. *Garcia*, 131 Idaho at 582, 961 P.2d at 1185 (Schroeder, J., dissenting) (quoting from “the pertinent portions . . . of the district court” opinion).

256. *Id.* at 585, 961 P.2d at 1188.

257. *Id.*

258. *Id.* It’s all in how you put it. The Idaho Court of Appeals, characterizing the same evidence, wrote: “Garcia’s employment was . . . terminated for misconduct involving young male employees of the hospital. The termination was based on allegations that Garcia had repeatedly invited these employees, who were under twenty-one years of age, to his home and offered to provide alcohol to them.” *Sisters of the Holy Cross*, 126 Idaho at 1037–38, 895 P.2d at 1230–31.

259. *Garcia*, 131 Idaho at 585, 961 P.2d at 1188 (Schroeder, J., dissenting).

260. Certainly the district court seems to be overstepping its bounds to declare that Garcia’s overtures to the young but adult co-workers could not possibly be found to be suggestive of attraction to underage males. *Id.* That is a classic jury question requiring expert testimony from those who treat sex offenders.

ing Doe? The hospital need avoid only gross negligence or worse. An agent of the hospital could have warned Doe or his parents, but at the risk of defamation and violation of privacy suits from Garcia. The employer hospital may well have won those suits, but only after extended litigation. Perhaps the rational fear of that litigation is enough to lead a jury—or a judge in the pretrial hearing allowed by title 6, section 1607(3) of the Idaho Code²⁶¹—to find no gross negligence. On the other hand, if Garcia had reasonably appeared to be engaged in his business but had engaged in bodily touching, the hospital could still be liable for improper touching even without proof of gross negligence.

3. *Rife v. Long* Factors

The court, in allowing the case to proceed to the jury, engaged in a general discussion of the sources of duty, addressing the *Rife v. Long* duty factors.²⁶² The court mentions *Rife* and the list of factors considered and weighed when “[d]etermining whether a duty will arise.”²⁶³ The court then goes on to discuss those factors “ask[ing] under *Rife* . . . whether there is a genuine issue of material fact concerning” the factors.²⁶⁴ This is an incorrect application of *Rife* and of duty analysis. Duty is a determination made, as a matter of law, by the judge. The *Rife* factors, as such, are not to be turned over to the jury for factual determination. Doubtless the jury will consider all of those factors, but it will do so in the context of determining breach, actual cause, proximate cause, and damage. As written, *Garcia* could lead to some confusion.²⁶⁵

B. *Hunter v. State Department of Corrections*

At the time of his crimes, Hood was a current employee of Mr. Wash but was far removed from both Mr. Wash’s premises and the scope of his employment.²⁶⁶ The essence of the Hunters’ claims is that Mr. Wash’s management had been told to keep Hood from interacting with minors, yet failed to do so.²⁶⁷ Mr. Wash’s management did not

261. IDAHO CODE ANN. § 6-1607(3) (2004).

262. *Garcia*, 131 Idaho at 581, 961 P.2d at 1184 (citing *Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995)).

263. *Id.* (quoting *Rife*, 127 Idaho at 846, 908 P.2d at 148) (emphasis added).

264. *Id.*

265. Suggested by Dale Goble, Professor, University of Idaho College of Law.

266. *Hunter v. State Dep’t of Corr.*, 138 Idaho 44, 46, 57 P.3d 755, 757 (2002). *Hunter* was decided in 2002, but does not mention title 6, section 1607 of the Idaho Code, which was passed in 1999. This may be because the crime occurred in 1996.

267. *Id.*

know the nature of Hood's conviction, but should nonetheless have obeyed the probation officer given her superior knowledge of the terms of his probation.²⁶⁸

Attempting to apply title 6, section 1607²⁶⁹ to this matter is tricky. If Mr. Wash were held liable for its failure to obey, liability would be to some extent "based upon an employer/employee relationship."²⁷⁰ It would not necessarily be "for [an] act or omission of a current employee," but rather for its own failure to protect its other employee, Hunter.²⁷¹ Also, if Mr. Wash was going to hire a known parolee, it was arguably gross negligence to disregard the parole officer's instructions about something as important as the protection of minors.

The *Hunter* opinion's greatest fault is its failure to elucidate a rule. Insofar as a rule can be inferred, it is overbroad. *Hunter* was written as a duty decision. While the court more or less acknowledged the factual causal link between the employer and the death,²⁷² it overturned the jury verdict finding for the plaintiffs. The court did this with little legal analysis. In a section that purportedly discussed whether or not a duty existed, the court emphasized extending duty "too far," and the inability of defendant to "anticipate what bad consequences might result."²⁷³ These concerns have more the ring of proximate cause or breach than of duty. But proximate cause and breach are jury questions, and the court expressed displeasure that the matter had been sent to the jury. The court wanted to end the inquiry with a determination of "no duty." The simplest way (in the absence of the statute) to get there would have been to call on the *Rife* factors and conclude, as a matter of law in this case, that too few of those factors weighed in plaintiffs' favor: this particular harm to plaintiff was largely unforeseeable, the connection between the defendant employer's negligence and the harm that in fact occurred was insufficiently close, the employer was insufficiently blameworthy relative to

268. *Id.*

269. IDAHO CODE ANN. § 6-1607 (2004).

270. *Id.* § 6-1607(1).

271. *Id.* § 6-1607(2). Mr. Wash's supervisory employees did not necessarily know Hunter's age. *Hunter*, 138 Idaho at 46, 57 P.3d at 757. The supervisors' obvious constructive knowledge, from her employment records, was not mentioned in the opinion. Hunter's status as an employee is relevant primarily in order to establish that Mr. Wash owed her a duty, albeit one that would normally be discussed in the workers' compensation system rather than the district court. That duty may or may not have been extinguished when Hunter quit her job.

272. *Id.* at 50-51, 57 P.3d at 761-62.

273. *Id.* at 50, 57 P.3d at 761.

other parties, and the burden on the community was too great if hiring of probationers was as chilled as allowing recovery in this case would likely have made it.

However, the court apparently intended to establish a broader "no duty" rule. In this the court itself went too far. Quite a few employer duties remain after *Hunter*; a matter the court should clarify at some point in the future. The *Hunter* court believed that plaintiffs, and the *Garcia* court, took the employer's duty "too far," but it gave no content to that phrase.²⁷⁴ Instead the court made the following assertions without clearly indicating which was determinative:

a) Hunter was no longer employed by Mr. Wash when she was raped and killed, and the event did not occur in connection with work.²⁷⁵

b) There is no general duty to control the actions of another, but "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person *in any situation in which it could be reasonably anticipated or foreseen that such a failure to use such care might result in such injury.*"²⁷⁶

c) In prior cases, like *Alegria v. Payonk*,²⁷⁷ a duty was found when bartenders had acted affirmatively by serving liquor to an obviously intoxicated minor. The *Hunter* court described "[t]he theory of the [*Alegria*] case was that the bartenders had acted affirmatively; they served the minor before he got in his automobile."²⁷⁸

d) The decision in *Doe v. Garcia*, was on a motion for summary judgment, determining that there was a material fact in dispute which precluded summary judgment. In this case [*Hunter*] the facts were fully developed at trial.

Submitting [*Hunter*] to the jury was consistent with *Doe*

274. *Id.*

275. *Id.* at 46, 57 P.3d at 757.

276. *Id.* at 50, 57 P.3d at 761 (quoting *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980)).

277. 101 Idaho 617, 619 P.2d 135. In *Alegria* bartenders had the doubly bad judgment to illegally serve alcohol to a minor who was obviously intoxicated. *Id.* at 618, 619 P.2d at 136. The minor then caused a car accident which killed Mrs. *Alegria*. *Id.* The court allowed her family to sue the bars where the minor had been served. *Id.* at 621, 619 P.2d at 139.

278. 138 Idaho at 50, 57 P.3d at 761. The *Hunter* court emphasized that, in apparent contrast to Mr. Wash, the *Alegria* bartenders had affirmatively undertaken to act. *Id.* But the court failed to distinguish the "action" of serving drinks from the "action" of putting an employee on the payroll, giving him a badge and a coat, and attending to all the details attached to undertaking to hire someone.

v. Garcia, but that case and this case extend the duty of an employer too far for consequences outside employment . . . ²⁷⁹

e) The staff at the North Idaho Correctional Institution, the judge who placed Hood on probation, and the probation officer who supervised him did not foresee that Hood would murder. "Imposing a duty on Mr. Wash to anticipate what bad consequences might result from placing Hood where he would have contact with a minor girl reaches too far."²⁸⁰

f) "Mr. Wash was found to have half as much responsibility for Hunter's death as Hood who actually killed her. That defies common sense."²⁸¹

h) This case "illustrates the hazards of putting an emotionally charged issue to an understandably sympathetic jury."²⁸²

These assertions raise more questions than they answer.²⁸³ The court's primary distaste for the finding of liability arose from the lack of foreseeability of the murder to anyone, including to people far more expert in criminology than the owners and operators of a car wash. While some crime, especially a sexual crime, would not have been unexpected, the murder was not foreshadowed by Hood's admittedly

279. *Id.* Justice Schroeder, who wrote the opinion in *Hunter*, was the sole dissent in *Garcia*.

280. *Id.*

281. *Id.* at 51, 57 P.3d at 762.

282. *Id.*

283. Another question, now nearly moot because of title 6, section 1607 of the Idaho Code, concerns the effect of *Hunter* on *Garcia*. James C. Dale, Editor of Idaho Employment Law Letter, noted that "[a]lthough not specifically stated in *Hunter's* case, the court seems to have reversed the older case of *Doe v. Garcia*." Dale & Hollister, *supra* note 57. Obviously this secondary source cannot determine the fate of *Garcia*. The answer must be gleaned from the language of the *Hunter* opinion. The words "overturned" or "abrogated" cannot be found in the passage concerning *Garcia*, but *Hunter's* disapproval of *Garcia* is unmistakable: "that case . . . extend[s] the duty of an employer too far." *Hunter*, 138 Idaho at 50, 57 P.3d at 61. In keeping with the principles of judicial conservatism, the *Hunter* opinion did not opine about hypothetical fact patterns not in front of it, and restricted its commentary to the facts of *Garcia* as established at the time of summary judgment and to the facts as established at trial in *Hunter* itself. *Garcia* was not dead after *Hunter*; much room was left for lawyers to argue for liability if an employer had more control than Mr. Wash, or if the events were more directly connected to the workplace than Hood and Hunter's encounters in his apartment after she had ceased to be employed by Mr. Wash.

criminal past.²⁸⁴ Concerning the state's liability, the court found that ultimately no substantial and competent evidence existed to support the jury's verdict that the state was reckless.²⁸⁵ But the court held that the state was not immune and that the mater was correctly submitted to the jury.²⁸⁶

Yet the heading of the section concerning Mr. Wash's liability reads "The Claim of Negligence Should Not Have Been Submitted to the Jury."²⁸⁷ The court did not explain why the jury should not have had a chance to assess the employer's behavior, just as it did the state's. The employer's carelessness was arguably easier to establish than the state's, because the employer had direct information that Hood "was not to interact with minors."²⁸⁸ The court purported to make a determination that Mr. Wash still had no duty. But reading the opinion as a whole, the court was actually making a finding that no substantial evidence supported the jury's finding of breach by Mr. Wash despite the warning from the probation officer.²⁸⁹ This would mirror the court's finding that no evidence supported a finding that the state was reckless.

If so, this is more nearly a breach or proximate cause holding than a duty holding. Insofar as the employer took an unreasonable risk by disobeying a probation officer and risking inappropriate sexual encounters between a minor employee and the adult employee, the scope of that risk did not encompass a risk of murder.²⁹⁰ This torque in the foreseeability analysis could be addressed in breach²⁹¹ (what harm should have been foreseen in order to be avoided) or proximate

284. Experts in criminology could shed light on the likelihood of a statutory rapist, or a forcible rapist, to murder.

285. *Hunter*, 138 Idaho at 49-50, 57 P.3d at 760-61.

286. *Id.* at 48, 57 P.3d at 759. The court rejected the State's argument that it was immune. *Id.*

287. *Id.* at 50, 57 P.3d at 761.

288. *Id.* at 46, 57 P.3d at 757.

289. *Id.* at 49-50, 57 P.3d at 760-61. The standard for taking the factual determination of breach away from the jury is that based on the evidence before the court, reasonable minds could not differ that no breach of duty occurred. *Id.* at 47, 57 P.3d at 758. The factual determination of actual causation can also be taken away from the jury if reasonable minds could not differ. The State's brief raised an actual cause issue not discussed by the court in its opinion: that Hunter met Hood *before* her employment at Mr. Wash. See State Brief, *supra* note 60, at 5. If so, Mr. Wash was not a major factor, if it was a factor at all, in the causal chain of events. If that evidence was uncontroverted, the matter of Mr. Wash's liability should not have been submitted to the jury.

290. *Hunter*, 138 Idaho at 50, 57 P.3d at 761; *cf.* *Caldwell v. Idaho Youth Ranch, Inc.*, 132 Idaho 120, 968 P.2d 215 (1998).

291. Foreseeability is also addressed by the judge, in general terms, as one of the *Rife v. Long* duty factors. *Hunter*, 138 Idaho at 49-50, 57 P.3d at 760-61.

cause²⁹² (was the harm foreseeable and thereby within the scope of defendant's responsibility).²⁹³

Given the rarity of similar scenarios, *Hunter* would be of minimal precedential value as a breach or proximate cause case to employers as a general class. Perhaps the court was trying to relieve Idaho employers by writing the case as a more generalized duty decision. But as some duties remain alive even after *Hunter* and the passage of title 6, section 1607, the employers of Idaho, in attempting to determine the limits of their liability, should posit for themselves the more likely scenario: what if Hood had not been murdered but had been raped by Hunter. Would Mr. Wash have been liable? That rape would have been foreseeable based on the probation officer's proscription to Mr. Wash's managers. The *Hunter* opinion does not provide guidance on whether the rape victim would have a successful cause of action, or if that cause of action would fail at the duty, breach, or proximate cause stage of tort analysis.

The court mentioned that *Hunter* was no longer an employee of Mr. Wash without explaining the significance of that statement.²⁹⁴ In order to further test the limits of employer liability, imagine that the victim was not an employee but another child not in a special relationship with the employer. For example, the victim could be a child living in the area of the car wash who began chatting with the employees of the business, including the sex offender employee. The basic common law duty rule, reiterated by *Hunter*, is that one does not have a duty to control the conduct of another even though, at the

292. Foreseeability also plays into a standard intervening cause analysis. The employee's crime is an intervening cause between defendant's negligent oversight of the workplace and plaintiffs' harm. Criminal acts are generally so extraordinary as to be superceding causes. While a sexual crime might have been sufficiently foreseeable in this case for a jury to find no superceding cause, a murder was exceedingly unforeseeable and extraordinary and, hence, arguably superceding.

293. The *Hunter* case leads us toward the classic proximate cause conundrum. Many readers may remember "the familiar instances of the running down of a pedestrian by a safely driven but carelessly loaded car, or of the explosion of unlabeled rat poison, inflammable but not known to be, placed near a coffee burner." *Petition of Kinsman Transit Co.*, 338 F.2d 708, 724 n.9 (2d Cir. 1964) (citing *Larrimore v. Am. Nat'l Ins. Co.*, 89 P.2d 340 (1939)). Even if Mr. Wash was negligent as to the risk of allowing Hood to interact with Hunter, the harm foreseen would have been statutory rape not murder. It may well be that this removes the murder from Mr. Wash's scope of responsibility, as foreseeability is an essential inquiry for proximate cause. The link between proximate cause and the duty to prevent (or not to bring about) third party misconduct is noted by the drafters of the *RESTATEMENT (THIRD) OF TORTS* § 17(c) (Discussion Draft 1999).

294. The employment status of the victim is not important in Idaho. *IDAHO CODE ANN.* § 6-1607 (2004).

same time, one does owe a duty to every person to avoid injury if it would be "reasonably anticipated or foreseen that a failure to use [due] care might result in such injury."²⁹⁵ The hypothetical employer would have had direct information about the impropriety of allowing the child to associate with the sex offender employee. The high foreseeability of sexual misconduct, the vulnerability of the child, and the causal role played by the employer in creating the situation all might lead to a finding of duty in this hypothetical situation.

The court ended its opinion by stating: "The man who actually killed Hunter had virtually all, if not all the responsibility for her death. Finding otherwise illustrates the hazards of putting an emotionally charged issue to an understandably sympathetic jury. Mr. Wash had no duty that extended to this tragic event."²⁹⁶ Surely this was a throw-away passage, not a holding to eliminate all third party liability for crimes and intentional torts. The court was correct to highlight the absurdity of the jury's apportionment of Hood's negligence at 40%.²⁹⁷ But the court mistakenly implied that the fault lay with the jury. It is misplaced and disingenuous to blame jurors for the incoherence of the legal system. The legal doctrines of comparative fault and apportionment of negligence are ill-named and not entirely well conceived. The names of the doctrines emphasize fault and negligence. But really, when asked to make comparative "fault" assessments, jurors are being asked to assess two things: the degree of culpability (breach) and the degree of causal connection (actual and proximate cause). Then the jurors are asked to merge these two assessments into one falsely objective number to "apportion" the liability in the form of a percentage. To add to the confusion, proportioning "negligence" in this case is inapposite, for Hood was not really negligent at all. He was, one hundred percent, an intentional tortfeasor and a criminal.

The jury here did find both breach and proximate cause against Mr. Wash. That ruling was upheld by the judge in the face of a request for a judgment notwithstanding the verdict and for a new trial,²⁹⁸ which lends credence to the rationality of the verdict. The court's dismissive appraisal of the jury as "emotional" seems unwarranted, especially when juxtaposed to the trial judge's refusal to disturb the verdict.

As written, this case sends several displeasing messages. Facts as extraordinary as those in *Hunter* are not likely to arise very often.

295. *Hunter*, 138 Idaho at 50, 57 P.3d at 761 (quoting *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980)).

296. *Id.* at 51, 57 P.3d at 762.

297. *Id.* at 46, 57 P.3d at 757.

298. *Id.*

The court may have considered these claims to be far-fetched, but its discourteous, disrespectful, and gratuitous mention of the flirtatiousness of plaintiffs' dead daughter²⁹⁹ may discourage the bringing of many other claims to the courts of Idaho. In other tragedies, defendants may not be deterred or held responsible in circumstances where they are more clearly or directly responsible for injury than was Mr. Wash in this case.

Most troubling, for the purposes of this article, is the court's cavalier removal of responsibility from the employer's shoulders. The employer is allowed, without legal consequence, to ignore the direct instruction of a parole officer. Reintegration of parolees into society is important, but it cannot be achieved without due care and diligence on the part of all participants in the reintegration process. Again, reasonable minds could differ on whether sufficient proximate cause linked Hood's crimes to Mr. Wash's disregard of the instructions, but that is grounds to send the matter to a jury, not to relieve the employer of liability at the duty stage.

C. Hei v. Holzer

This opinion is convoluted to read, perhaps because of the myriad causes of action, governmental liability issues, and apparently uneven prosecution of the case by plaintiffs. The court is surprisingly uncensorious of a relationship between a high school teacher and a high school junior.³⁰⁰ But whether or not Hei and Holzer's relationship was tortious is a question of social or educational policy, not one of tort duty.³⁰¹ The question for this article is whether the school district would be responsible for the frolic of its servant, Holzer. The statute was not discussed in the opinion.³⁰²

Hei was successful in her claims that the district/employer owed her a duty to protect her. These duties arose statutorily from Title IX and title 33, section 512 of the Idaho Code, and out of a common law

299. *Id.*; see also *supra* note 57.

300. 139 Idaho 81, 73 P.3d 94 (2003). Justice Walters, in dissent, was especially concerned that a condemnation of Hei and Holzer's relationship might translate into the university setting. *Id.* at 89, 73 P.3d at 102 (Walters, J., dissenting). The need for stricter order at a high school, and the overwhelming presence of students under eighteen would seem to be sufficient for differentiation.

301. The most obvious candidate for emotional injury would be Mrs. Holzer. Injury to Hei is understood only after contemplating her youth and her status as Holzer's student and a student at the school.

302. Idaho Code section 6-1607 was passed in 1999, but the complaint in this 2003 case was filed two years earlier, in 1997. *Id.* at 84, 73 P.3d at 97.

duty owed by schools to pupils. This seems in keeping with tort law. A duty to supervise with due care flows from this duty of protection. This duty is not based on an "employer/employee relationship" between defendant and a third party, but rather on the district/pupil relationship between defendant and plaintiff. Further the statute expressly disavows any intention to limit people's rights under the anti-discrimination statutes, so Hei's Title IX claim would not be extinguished.³⁰³

It seems appropriate that no duty to control arose out of the employer's relationship with the employee, because there was no allegation of any special knowledge that this employee was dangerous. The duty to control Holzer—or "supervise," as it is termed in the case—arose out of the relationship between the pupil Hei and the school and the district.

Actual cause is problematic in this case, because Hei interacted with Holzer outside of school as well as in school.³⁰⁴ Contemplating this causal point exposes our conception of duty. If the school did not create the situation and was not the actor setting in motion the relationship between Hei and Holzer, we tend to say "it wasn't their fault." Fault, of course, is the word that most technically denotes negligence in behavior. But in spoken English it also can mean actual cause (they made a potentially bad choice but it did not hurt anyone) or even proximate cause (even if they were a technical cause we will not hold them responsible, we will not blame them).

Ironically, in this case where liability would probably be allowed even if title 6, section 1607 of the Idaho Code were applied, the employer's alleged negligence does not leap out from the pages of this opinion overruling summary judgement. Unlike the astonishing facts of *Garcia* and *Hunter*, scenarios similar to those in *Hei* are more common. The employee's act was not criminal, the damage was emotional rather than physical, and plaintiff's own actions and consent were contributing factors.³⁰⁵ Holzer's employment at the school provided the potential for abuse; the nature of the job further enhanced that potential. The role of teacher and coach easily and properly becomes one of advisor, counselor, and confidant; the problem arises when the confidant becomes the intimate and the lover. One message of the case is that the school district, well aware of this potential progression, needs to be on the lookout and take reasonable steps to protect pupils from abuse. The jury will determine what steps were reason-

303. IDAHO CODE ANN. § 6-1607(4) (2004).

304. See *supra* notes 68–76 and accompanying text.

305. Obviously, the essence of plaintiff's claims is that the age and power differential rendered the relationship abusive and quasi-nonconsensual.

able in the factual context of the case.

This decision reaches beyond the schoolhouse. It sets precedent for employers who must protect the vulnerable who may encounter employees who, under the cloak of authority, can do harm.

V. CONCLUSION

Even after *Hunter* and title 6, section 1607 of the Idaho Code, Idaho employers may be successfully sued for failing to think about liability to others for the bad acts of their employees. Naturally, employers must be on the lookout for simple negligent performance of duty. But employers also must hire with care, looking out for signs of proclivities to do harm that might not be in the course of employment but that are foreseeable because of the background of the prospective worker, the vulnerability of the people with whom the worker will come in contact, the nature of the contact the worker will have with others, and so forth. Employers must consider the possibility of abuse of authority, or color of authority (including uniforms, badges, and the like), by current and past employees. Related to this is the possibility that a worker could blend proper, work-related activities with improper activities. The more vulnerable the potential victims, the higher the duty owed to them. It is still true that the master has a fair degree of responsibility for the acts of the servant—and even the ex-servant.